Jurisdictional Statement

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IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

No. .....

FORD MOTOR CREDIT COMPANY
AND
TRADEWINDS FORD SALES, INC.

Appellants,

VS.

DON B. CASKEY, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is the decision of the Texas Supreme Court here in conflict with the Due Process Requirements of the Federal Constitution, as those requirements are applied by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964)?

2. Can Article 5069-7.07(4) of the Texas Consumer Credit Code, which prohibits contractual waivers of rights of action for illegal acts committed in a repossession, be constitutionally extended by court construction to prohibit waivers of rights of action for conduct arising subsequent to a repossession?

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APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

JURISDICTIONAL STATEMENT

Pursuant to Rules 12 and 15 of the Rules of the Supreme Court of the United States, Appellants Ford Motor Credit Company[1] and Tradewinds Ford Sales Inc., file this Statement of the basis upon which this Court has jurisdiction to review the final judgment of the Supreme Court of the State of Texas in this case, and why this Court should exercise that jurisdiction herein.

[1] Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company. All subsidiaries of Ford Motor Credit Company are either wholly owned by Ford Motor Credit Company or are wholly owned by Ford Motor Credit Company and other subsidiaries of Ford Motor Company. Ford Motor Credit Company may be considered an affiliate of the subsidiaries of Ford Motor Company listed in Appendix I. Co-Appellant Tradewinds Ford Sales, Inc. has no affiliates or subsidiaries.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas is reported at 616 S.W.2d 935 (May 16, 1981), and is reprinted in Appendix A. That opinion by the Texas Supreme Court was based on another decision issued by that Court just one week earlier in *Zapata* v. *Ford Motor Credit Company,* 615 S.W.2d 198 (1981). A copy of the *Zapata* opinion is reprinted in Appendix B. The opinion of the Court of Civil Appeals for the Eleventh Supreme Judicial District at Eastland, Texas, is reported at 600 S.W.2d 865 and is reprinted in Appendix C. The Final Judgment entered by The Honorable Norman Utter, in the 214th District Court of Nueces County, Texas, appears at Volume 8, pages 929-931 of the Minutes of that Court, and is reprinted in Appendix D.

THE JURISDICTIONAL GROUNDS OF THIS APPEAL

This is a civil suit concerning the imposition of statutory penalties under the Texas Consumer Credit Code to a motor vehicle installment sale transaction. Tex.Rev.Civ. Stat.Ann., Art. 5069-7.01 et. seq. The opinion of the Texas Supreme Court awarding such penalties was rendered on May 13, 1981. On June 10, 1981, Appellants' Motion for Rehearing concerning the alleged Credit Code violation at issue herein was denied.[2] Appellants' Notice of Appeal, reprinted in Appendix E, was filed with the Clerk of the Texas Supreme Court on August 4, 1981. The appellate jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).[3]

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[2] That Motion for Rehearing was granted in part as to technical matter concerning the form of the Supreme Court's mandate. 24 Tex. Sup. Ct. J. 454 (June 13, 1981). That relief is unrelated to the issue involved in this appeal.

[3] The Texas Supreme Court's decision in *Zapata* v. *Ford Credit, supra,* on which that Court's decision in this case was based, has

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Texas statute at issue herein is Section 7.07(4) of the Texas Consumer Credit Code, Article 5069, Tex.Rev. Civ.Stat. Ann. (1974), which provides as follows:

> "No retail installment contract or retail charge agreement shall: . . . .
>
> > (4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle."

The full text of Chapter Seven of the Consumer Credit Code, as it existed at the time of the transaction at issue, is reprinted in Appendix F.

As construed and applied by the Texas Supreme Court, Art. 5069-7.07(4) of the Texas Consumer Credit Code violates the Due Process Clause of Section I, of the Fourteenth Amendment of the United States Constitution, which states as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law . . . ."[4]

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also been appealed to the United States Supreme Court. The *Zapata* appeal was docketed on August 31, 1981. Appellants intend to move this Court to consolidate its consideration of this and the *Zapata* case.

[4] Pursuant to Rule 28(c), this Court is hereby advised that 28 U.S.C. § 2403(b) may be applicable. Copies of Appellants' Notice of Appeal and this Jurisdictional Statement have been served on the office of the Attorney General for the State of Texas.

STATEMENT OF THE CASE

In October 7, 1977, Don B. and Ralph E. Caskey (the "Caskeys") purchased a new 1977 Ford Thunderbird from Tradewinds Ford Sales, Inc., of Corpus Christi, Texas, financing the purchase by executing a Retail Installment Contract (hereafter referred to as the "contract"). A copy of that contract is attached as Appendix G. The contract was assigned to Ford Motor Credit Company ("Ford Credit"), and Caskey was subsequently notified of the assignment. The Caskeys quickly filed this suit against Ford Credit and against Tradewinds Ford, alleging that the contract violated the Texas Consumer Credit Code, Tex. Rev. Civ. Stat. Ann., Art. 5069, Chapters 7 and 14, and the Federal Consumer Protection Act. 15 U.S.C. § 1631 et seq. Because Appellees had not made any payments due under the contract, Appellant Ford Credit filed a cross-action for the unpaid principal, earned interest, and fees.

The Caskeys subsequently moved for Partial Summary Judgment against Ford Credit and Tradewinds Ford. The Trial Court granted that motion as to the alleged Texas Consumer Credit Code allegations, and entered a judgment holding the Defendants jointly and severally liable for statutory penalties in the amount of $12,672.48. After a trial on the issue of attorneys' fees, the Trial Court entered final judgment for Caskey on November 27, 1978, granting the $12,672.48 statutory penalty, plus attorneys' fees in the amount of $5,000.00, interest, and court costs. (Appendix D) Those penalties were awarded even though the Caskeys had suffered no actual damages as a result of any of the alleged Credit Code violations. Ford Credit and Tradewinds Ford appealed from that judgment.

The Texas Court of Civil Appeals reversed the District Court, finding that no Consumer Credit Code violations

existed. (Appendix C) Thereafter, the Caskeys filed an application for Writ of Error to the Texas Supreme Court. That Court delayed any decision on the Caskeys' application pending its decision in the case of *Zapata* v. *Ford Motor Credit Company and Yates Ford, Inc.*, 615 S.W.2d 198 (1981). On May 6, 1981, the Texas Supreme Court issued its opinion in *Zapata*. In that opinion, the Texas Supreme Court found that the contract clause concerning personal property (the "personalty provision") violated Art. 5069-7.07(4) of the Credit Code, because it amounted to a prohibited waiver of a buyer's right of action for illegal acts committeed in the repossession of collateral. (Appendix B) The suit by the Caskeys also contained an Art. 5069-7.07(4) allegation regarding identical control language. The Supreme Court therefore granted the Caskeys' application for Writ of Error on that issue, reversed the judgment of the Court of Civil Appeals, and reinstated $3,667.80 of the original statutory penalty award.[5]

In the trial court and the Texas Court of Civil Appeals below, Appellants argued that as a matter of contract construction the personalty provision did not amount to a waiver of a buyer's right of action for any illegal acts. Appellants further argued that even if there was a waiver present, it was not the type of waiver prohibited by Art. 5069-7.07(4) because it related only to post-repossession acts. The pertinent part of Art 5.069-7.07(4) prohibits only waivers involving illegal acts *committed in* a repossession. Appellants also argued, by way of a separate point of error to the Court of Civil Appeals, that Art. 5069-7.07(4)

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[5] The statutory penalties included in the trial court's final judgment also included an award for an alleged usury violation. The Texas Court of Civil Appeals also reversed that award, and the Texas Supreme Court agreed that there was no usury violation. Thus, only a portion ($3,667.80) of the original statutory penalty of $12,672.48 was reinstated by the Supreme Court. The usury issue is not involved in this appeal.

would be rendered unconstitutionally vague if extended by court construction to cover waivers involving acts *committed after* a repossession.[6]

The Court of Civil Appeals held that even if the contract language amounted to a waiver of a right of action for an illegal act (an issue not reached), it was not the type of waiver prohibited by Art. 5069-7.07(4). Specifically, the Court of Civil Appeals stated that:

> "The retention of personalty in or attached to a vehicle is an act which occurs after repossession. There is no reference in the Code to acts which occur after repossession. If the Legislature had intend to prohibit the waiver of rights of action for all "illegal acts," including acts committed after repossession, "it would have been a simple matter to have so stated." See *First State Bank of Bedford* v. *Miller*, 563 S.W.2d 527, 577 (Tex. 1978). Therefore, even if retention of the personalty after repossession is an illegal act, a matter we are not required to consider, neither Article 5069-7.07(3) nor

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[6] The Points of Error raised by Appellants in the Court of Civil Appeals are:

FOURTH POINT OF ERROR

The trial court erred in granting judgment for the appellee because the appellees did not waive any rights of action against the seller or holder for any illegal act that might be committed in the repossession of the collateral.

FIFTH POINT OF ERROR

The trial court erred in granting judgment for appellees because the "Personalty" provision of the contract does not waive any rights of action for illegal acts committed in the repossession of a motor vehicle or allow a breach of the peace in effecting repossession.

SIXTH POINT OF ERROR

The trial court erred in granting judgment for appellees because Section 7.07(4) of the Consumer Credit Code is unconstitutionally vague if applied to penalize post-repossession activities.

> 7.07(4) covers alleged illegal acts committed after repossession."

(Appendix C-11) That Court therefore reversed the trial court's judgment on the Art. 5069-7.07(4) issue. Because the Court of Civil Appeals applied the statute as it was written, it did not have to reach Appellants' constitutional argument.

Thereafter, the Caskeys petitioned the Texas Supreme Court for a Writ of Error. In reply, Appellants Ford Credit and Tradewinds Ford reasserted both the contract construction and constitutional arguments noted above.[7] As noted above, the Supreme Court delayed its consideration of the Caskey application until it decided *Zapata*. When it finally ruled in *Zapata*, the Court held that the personalty provision was indeed a waiver of a right of action for an illegal act, and that Art. 5069-7.07(4) could be applied to waivers concerning post-repossession acts. That Court made no mention in *Zapata* of the constitutional

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[7] The Reply Points made by Appellants to the Texas Supreme Court are:

FOURTH REPLY POINT

The court of civil appeals correctly held that Sections 7.07(3) and (4) of the Consumer Credit Code do not apply to events occurring after a repossession. (In Reply to Point of Error 3)

FIFTH REPLY POINT

The court of civil appeals correctly held that the contract in question did not waive any rights of action against the seller or holder for any illegal act that might be committed in the repossession of the collateral. (In Reply to Point of Error 3)

SIXTH REPLY POINT

The court of civil appeals correctly held that the "Personalty" provision of the contract in question does not waive any rights of action for illegal acts committed in the repossession of a motor vehicle, or allow a breach of the peace in effecting repossession. (In Reply to Point of Error 3)

problems presented by its extension of the statute. In a per curiam opinion handed down one week after *Zapata*, the Texas Supreme Court reached the same conclusion in *Caskey*. Again, no reference was made to the constitutional argument.

Appellants' constitutional argument was again asserted by specific Assignments of Error in its Motion for Rehearing to the Texas Supreme Court in *Caskey*.[8] That Motion was granted solely as to a technical error in the forming of the Court's mandate. Appellant's constitution Assignment was ignored.

It is clear that "once the validity of the statute is properly drawn in question . . . a state court cannot avoid a decision in favor of its validity by merely ignoring the question. Silent rejection of the question is effective as a decision in favor of validity ..." Wright and Miller, *Federal Practice and Procedure*, § 4012, at 609. The Appellants' contention that the statute was unconstitutional as applied has therefore been rejected by the highest Texas Court in which review can be had. *See also, Cohen* v. *California*, 403 U.S. 15 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 440 (1979). Appellants therefore invoke the appellate jurisdiction of this Court under Title 28 U.S.C. Section 1257(2).

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[8] Appellants' Assignments of Error raised in their Motion for Rehearing to the Texas Supreme Court are:

ASSIGNMENT OF ERROR TWO

This court erred in reversing the judgment of the court of civil appeals on the alleged violation of Art. 5069-7.07(4) because the theory of trespass ab initio has been repudiated in Texas.

ASSIGNMENT OF ERROR THREE

This court erred in reversing the judgment of the court of civil appeals because Art. 5069-7.07(4), as construed in Caskey, denies respondents due process of law by failing to give adequate notice that it applies to waivers of causes of action for illegal acts occurring after, rather than in, a repossession.

SUBSTANTIALITY OF THE FEDERAL QUESTION INVOLVED

This Statement will show that the decision of the Texas Supreme Court here: (1) is in direct conflict with the Due Process requirements of the Federal Constitution, as those requirements are applied by this Court in *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964); and (2) renders so uncertain the requirements of the Texas Consumer Credit Code applicable to retail installment credit transactions as to throw open to attack tens of thousands of retail installment contracts.

I.

INTRODUCTORY STATEMENT

This case involves the application of the Texas Consumer Credit Code. The Code was enacted in 1967 to regulate credit transactions within the state. Section 7 of the Code specifically applies to and regulates motor vehicle installment sales.

The Code is analogous to the Federal Truth-in-Lending Act in that it imposes certain disclosure duties on creditors and provides for statutory penalties for any violation. The penalty for violating the Code is generally twice the amount of interest or time-price differential involved in a given installment transaction, plus the plaintiff's attorneys' fees. Art. 5069-8.01. Such penalties are imposed without a requirement that any harm be suffered by the individual debtor-plaintiff.

The Credit Code not only establishes specific disclosure requirements, but also prohibits contracts from containing certain provisions. One of those "prohibited provision" section is at issue in this case. That section, Art. 5069-7.07(4), provides in pertinent part that no retail installment contract shall "[p]rovide for a waiver of the

buyer's rights of action against the seller or holder . . . for any illegal act committed . . . *in* the repossession of a motor vehicle." (emphasis added)

The portion of the retail installment contract at issue containing the allegedly prohibited provision is as follows:

> "Any personalty in or attached to the Property (the vehicle made the subject of the contract when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession." (parenthetic added)

No repossession was involved in this case. Indeed, it is undisputed that Appellant Ford Credit's policy is to consistently attempt to return any personalty discovered in a repossessed vehicle, even absent a demand on the part of the debtor.[9] Nonetheless, on November 27, 1978, the 214th District Court of Nueces County, Texas, entered final judgment ruling that that clause violated Section 7.07(4) of the Texas Consumer Credit Code. On April 24, 1980, the Court of Civil Appeals reversed that holding, ruling that the foregoing contract language did not amount to a waiver of a right of action for an illegal act committed in a repossession. The Texas Supreme Court subsequently granted writ of error, and on May 13, 1981, reversed the holding of the Texas Court of Civil Appeals. As a result, the Credit Code penalties were reimposed in this case, and all retail installment contracts containing the personalty provision at issue were placed in jeopardy.

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[9] Ford Credit's policy and procedures regarding such personalty is outlined in an affidavit filed with the trial court and included in the official record to the Texas Supreme Court and Court of Civil Appeals below. The pertinent portion of that Affidavit, executed on August 17, 1978 by Jim Hofbauer, Ford Credit's Assistant Branch Manager at the branch office which handled the *Caskey* account, is reprinted in Appendix H herein.

II.

THE DECISION OF THE TEXAS SUPREME COURT HERE IS IN DIRECT CONFLICT WITH THE DUE PROCESS REQUIREMENTS OF THE FEDERAL CONSTITUTION, AS THOSE REQUIREMENTS ARE APPLIED BY THIS COURT IN *BOUIE V. CITY OF COLUMBIA*, 378 U.S. 347 (1964)

A. By expanding the conduct prohibited by the Texas Consumer Credit Code to encompass conduct not clearly proscribed thereunder, the decision of the Texas Supreme Court here contravenes the due process clause and results in the statutory provision being unconstitutional as applied.

The Texas Supreme Court decision in *Zapata*, which was the basis for the result in *Caskey*, recognized that the personalty clause at issue contains two parts. The Court held that the first part of the contract clause, which provides that "[a]ny personalty in or attached to the property when repossessed may be held by seller without liability..." merely described a bailor-bailee relationship and as such does no more than restate the common law and Uniform Commercial Code rights of a creditor to take possession of personal property located in a repossessed vehicle and hold that property for the owner. The Texas Supreme Court therefore correctly found that the portion of the contract's personalty provision did not violate the Code. (Appendix B-5) More importantly, in unholding that portion of the provision, the Texas Supreme Court recognized that the act of taking possession of personal property located in a lawfully repossessed vehicle was *not* an illegal act *at the time* the vehicle was repossesed.

The Court held, however, that the second part of the personalty provision, which waives claims to such personal property if written demand is not made within 24 hours,

amounted to a waiver of a buyer's right of action for a subsequent wrongful detention of such property, and that such a waiver violated Art. 5069-7.07(4)'s prohibition against waivers of illegal acts committed "*in*" a repossession. The Texas Supreme Court noted that because the contract language obligated the secured party to return any seized personalty if written demand is made "within twenty-four hours after repossession," the only complaint could be that the contract waived the buyer's rights of action if the seller retains the property after the buyer fails to make a timely demand for its return. (Appendix B-7) The Court thus clearly recognized that such a detention of personal property could not occur "*in* the repossession of a motor vehicle," but only *after* the repossession had taken place. While the Texas Supreme Court recognized that the plain words of the statute only forbid waivers of claims for acts or events occurring "*in*" the repossession itself (Appendix B-7), the Court nonetheless held that the statute would be applied to render the contract language illegal. In doing so, the Texas Supreme Court disregarded the express language of Art. 5069-7.07(4) itself, and rewrote that statute so that it prohibited not only waivers of claims for illegal acts committed during a repossession, but also waivers of claims for acts occurring subsequent to a repossession.

Appellants submit that such an extension of Art. 5069-7.07(4) in *Zapata* and *Caskey* was constitutionally improper.[10]

It is fundamental that the due process clause of the Fourteenth Amendment requires that any statute creating

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[10] Appellants continue to adhere to their position that as a matter of contract construction the clause at issue does not amount to a waiver of a right of action for any act. For purposes of the constitutional issue involved in this Appeal, however, it will be assumed that the clause does amount to a waiver.

an offsense must be sufficiently explicit to inform those subject to it what conduct is prohibited. *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Missouri K & T Ry. Co. of Texas* v. *State*, 100 Tex. 420, 100 S.W. 766, 767 (1907). If a statute fails to give adequate notice of forbidden conduct, it is unconstitutional and void. *Coffee City* v. *B. J. Thompson*, 535 S.W.2d 758, 763 (Tex. Civ. App. — Tyler 1976, writ ref'd n.r.e.). The Courts have held that the constitutionally required notice is inadequate if a statute:

> ". . . either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . "

Connally v. *General Construction Co.*, 269 U.S. 385, 391 (1926). Moreover, if a statute is unexpectedly broadened by a judicial construction that makes unlawful conduct that had not appeared to be prohibited, and, as so construed, is applied to a pre-existing offense, it deprives those subject to the statute of due process of law. *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964).

To interpret Art. 5069-7.07(4) so broadly as to encompass waivers concerning acts committed after a repossession renders the statute unconstitutional as applied, because it gives no notice that it applies to acts committed after a repossession.

B. Resort to the archaic concept of *trespass ab initio* to interpret a penal statute so as to render illegal conduct not otherwise within the scope of the statute contravenes the notice requirements of due process.

It is of utmost importance to note that the "illegal act" found to have been waived by the Texas Supreme Court in *Zapata* and *Caskey* was *not* the act of taking possession of the property *during the course of* a repossession, but

rather the *subsequent* retention of such property after possession had been lawfully obtained. It is clear that such a waiver could not, by any normal method of statutory construction, be construed to be a waiver of claims for acts committed during a repossession — the only waivers prohibited by the Texas Credit Code provision involved. In its effort to bring this waiver within the frame work of the statutory proscription, the Court found it necessary to resort to the archaic legal fiction of "trespass ab initio." As described in the Texas Supreme Court's opinion, the fiction of *trespass ab initio* characterizes a subsequent wrongful detention of personalty by one originally in lawful possession as a trespass from the time of the original possession itself. Therefore, the Texas Court held that *trespass ab initio* provided the bridge whereby contract clauses containing only a waiver of claims for acts occurring subsequent to a lawful repossession could be punished under Art. 5069-7.07(4), which prohibits only waivers of claims for acts occurring in a repossession.

The Court's reliance upon the fiction of *trespass ab initio* only exacerbates the constitutional infirmity arising from the extension of Art. 5069-7.07(4). During the past century, the doctrine of *trespass ab initio* has become a doctrine of ill repute in the law. In 1987, Justice Holmes wrote of the doctrine:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imulation of the past. I am thinking of the technical rule as to *trespass ab initio*. . . ." (emphasis in original)

Holmes, *The Path of the Law*, 10 Harv.L.Rev. 457, 469 (1897).

Indeed, prior to the decision below, the theory of *trespass ab initio* had been repudiated by Texas, as well as by most modern courts. *See, W. H. Simpson* v. *Phillips Pipe Line Co.*, 603 S.W.2d 307 (Tex.Civ.App.—Beaumont 1980, writ ref'd. n.r.e.). In *Simpson*, the trial court had refused to apply the doctrine of *trespass ab initio*, and plaintiffs appealed. In approving the lower court's rejection of *trespass ab initio*, the Court of Civil Appeals noted the scant and aged case law which was asserted as its precedential basis in Texas. *See*, 603 S.W.2d at 309-10. The Court then discussed the longstanding and uniform disfavor with which the fiction has been viewed, in Texas and in all other jurisdictions. For example, the Court quoted 75 Am.Jur.2d, *Trespass* § 17, at 21 (1974), as follows:

> "The doctrine of trespass ab initio has been called 'a curious and unique fiction,' and has been vigorously denounced by writers who have discussed it. The Restatement of Torts has rejected the doctrine."

The rejection of *trespass ab initio* in the *Restatement (Second) of Torts*, § 214(2) (1965) was also cited:

> "One who properly enters land in the exercise of any privilege to do so, and thereafter commits an act which is tortious, is subject to liability only for such tortious act, and does not become liable for his original lawful entry, or for his lawful acts on the land prior to the tortious conduct."[11]

The *Simpson* Court then referred to the Official Comment to § 214 of the *Restatement (Second) of Torts*, which

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[11] The *Restatement* also rejects the doctrine of *trespass ab initio* in the context of conversion or other interferences with a possessory interest in chattels. *See* § 278(2), at 507; *see also*, Official Comment (2) at 508.

described *trespass ab initio* as a "peculiar and anomalous fiction," and which noted at p. 409 that:

> "Since 1900 the weight of authority has rejected trespass ab initio, and there have been very few cases in which it has been applied."

The repudiation of *trespass ab initio* in Texas is not limited to the *Simpson* case. The fiction has also been excised from Texas jurisprudence for statute of limitations purposes. *See, Southwestern Bell Telephone Co.* v. *Commercial Metals Co.*, 389 S.W.2d 116 (Tex.Civ.App. — Houston 1965, no writ); *Taylor* v. *Watson & Co., Inc.*, 502 S.W.2d 613 (Tex.Civ.App. — Dallas 1973, writ ref'd n.r.e.); *see also, Snell* v. *Short*, 544 F.2d 1289 (5th Cir. 1977); and *Goodbody & Co.* v. *McDowell*, 530 F.2d 1149 (5th Cir. 1976).

In sum, Texas courts rejected the doctrine of *trespass ab initio* long before *Zapata* and *Caskey* were decided. Yet, despite its discredited and repudiated status, the Texas Supreme Court based its interpretation of Art. 5069-7.07(4) exclusively on that doctrine. That fact only heightens the constitutional problem at issue. In order to know that contract language falling outside the plain meaning of Art. 5069-7.07(4) could be proscribed thereunder, the contract drafter, if he considered a waiver of property rights to be a waiver of an illegal act in the first place, would have had to foresee the retroactive application of a medieval legal fiction which has been variously characterized as "outworn,"[12] "peculiar and anomalous,"[13] "capricious,"[14] "revolting,"[15] "treacherous,"[16] and "on its way to oblivion."[17]

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[12] *Simpson* v. *Phillips Pipeline, supra*, at 311.

[13] *Restatement (Second) of Torts*, Official Comment to § 214(2).

[14] Williams, *A Strange Offspring of Trespass Ab Initio*, 52 L.Q. Rev. 106 (1936).

[15] Holmes, *The Path of the Law, supra.*

[16] 1 Harper & James, *The Law of Torts*, § 1.21 at 297 (1956).

[17] W. Prosser, *The Law of Torts, supra* at 131.

He would then have to ignore the fact that the fiction has been repudiated by the vast majority of American jurisdictions,[18] and by the only cases to reach the Texas Supreme Court in modern times.[19] He would also have to anticipate that the fiction would be applied not merely to evaluate an actual tort, but for the novel purpose of construing a penal statute. Certainly nothing in the statute warrants such remarkable prescience.

Therefore, the Texas Supreme Court was not at liberty to give Art. 7.07(4) the interpretation set out in the *Zapata* opinion, and incorporated in *Caskey*. To do so gives so little notice of the application of that penal statute as to render it unconstitutionally vague and therefore void.[20]

C. The decision of Texas Supreme Court here is contrary to this Court's decision in *Bouie v. City of Columbia*.

The constitutional problem raised by the *Zapata* and *Caskey* cases is strikingly like that corrected by the United States Supreme Court's decision in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964). In *Bouie*, the issue was the enforcement of a trespass statute which prohibited "entry upon the lands of another.... after notice from the owner or tenant prohibiting such entry...." Two defendants were charged with violating that statute, even though they did not receive notice to leave until after they had entered the

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[18] *Restatement (Second) of Torts*, § 214(2), *supra*.

[19] *Simpson* v. *Phillip Pipeline*, *supra*; *Taylor* v. *Watson & Co.*, *supra*.

[20] It does not matter whether the *Zapata* and *Caskey* opinions are characterized as extending the scope of Art. 5069-7.07(4) beyond its literal terms so that "committed in" includes "committed after," or as redefining by resort to fiction one's behavior so as to bring it within the literal terms of Art. 5069-7.07(4). Under either characterization, the same failure to give notice of what behavior is prohibited by the statute is involved, and the same constitutional issue is presented. *See*, *Burnet* v. *Wells*, 289 U.S. 670, 677-8 (1932) (Cardoza, J.)

premises. The South Carolina Supreme Court upheld their convictions, construing the trespass statute "....to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." That construction was challenged as violating the due process clause by failing to give fair warning of the conduct which was prohibited.

The United States Supreme Court agreed with that constitutional claim. The Court first noted that the due process clause required the penal statute before it to give fair notice of what it prohibited, as follows:

> "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court. As was said in *United States* v. *Harriss*, 347 U.S. 612, 617:
>
> > 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'
>
> Thus we have struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' *Connally* v. *General Const. Co.*, 269 U.S. 385, 391. We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law,' *ibid.*, and that 'No one may be required at peril of life, liberty or property to speculate as to

> the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453. (footnote omitted)

378 U.S. at 350-51.

The same constitutional principles discussed in *Bouie* apply to the penal statute at issue here, which imposes fines in civil proceedings.[21] See *A. B. Small* v. *American Sugar Refining Co.*, 267 U.S. 233, 239 (1924).

The Supreme Court in *Bouie* then noted that in most of its prior "void-for-vagueness" decisions, the fatal uncertainty resulted from vague or overbroad language in the statute itself. On its face, however, the South Carolina trespass law was "admirably narrow and precise" (i.e., the statute applied only to "entry upon lands of another. . . . after notice. . . . prohibiting such entry. . . ."). 378 U.S. at 351-2.

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[21] The Texas Courts have recognized that the Consumer Credit Code is a penal statute. *See, Bundrick* v. *First Nat'l Bank*, 570 S.W.2d 12, 17 (Tex. Civ. App. – Tyler 1978, writ ref'd n.r.e); *Hight* v. *Jim Bass Ford*, 552 S.W.2d 490, 491 (Tex. Civ. App. – Austin 1977, writ ref'd n.r.e.); *Ford Motor Credit Company* v. *B. L. Long*, 608 S.W.2d 293 (Tex. Civ. App. – Beaumont 1980, writ ref'd. n.r.e.).

Those decisions are consistent with a long line of Texas Supreme Court decisions which have held that any statute which authorizes damages beyond the amount necessary to compensate for actual harm or provides for attorney's fees is penal in nature. *First State Bank of Bedford* v. *Miller*, 563 S.W. 2d 572, 577 (Tex. 1978); *Tenneco Oil Co.* v. *Padre Drilling Co.*, 453 S.W.2d 814, 818 (Tex. 1970); *Van Zandt* v. *Ft. Worth Press*, 359 S.W.2d 893 (Tex. 1962); *Perry* v. *Leuttich*, 121 S.W.2d 332, 333 (Tex. 1938). It is also well established that penal statutes are to be narrowly construed. *Satterfield* v. *Satterfield*, 448 S.W.2d 456, 459 (Tex. 1909); *Commerce Trust Co.* v. *Best*, 80 S.W.2d 942, 947 (Tex. 1935). Any doubt as to the coverage of such a statute must be resolved in favor of the defendant. *Gulf, Colorado & S.F. Ry. Co.* v. *Dwyer*, 84 Tex. 194, 19 S.W.2d 470 471 (Tex. 1892).

Rather, the fatal uncertainty in the trespass statute arose from the "unforeseeable and retroactive expansion of the narrow and precise" statute by the South Carolina Supreme Court. 378 U.S. at 352. Thus, the statute was rendered unconstitutionally vague *as applied*. The Court recognized that that was an even greater constitutional affront than overbroad statutory language itself, stating as follows:

> "The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or to 'guess at the statute's meaning and differ as to its application,' as in *Connally*, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

378 U.S. at 352. Indeed, the Court further noted that such an unforeseeable judicial enlargement, applied retroactively, operated "precisely" like an *ex post facto* law, which the Constitution forbids. *Id* at 353-4.

Again, the parallel between *Bouie, Zapata,* and *Caskey* could not be more direct. Art. 5069-7.07(4) is not vague or overbroad on its face. Rather, it is "narrow and precise," thus giving the drafter "no reason ever to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction."[22] *Id.*

The *Bouie* Court concluded its discussion of void-for-vagueness principles by characterizing the due process issue as the same as that involved when a state court "overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing," thus denying him his due process right to be heard. The *Bouie* Court noted that the same "standards of state decisional consistency" are applicable in determining "whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of fair warning to which the Constitution entitles him." In both situations, the Court noted that:

> "'. . . a federal right turns upon the status of state law as of a given moment in the past — or, more exactly, the appearance to the individual of the status of state law as of that moment. . . .'" [Citation omitted]

Id. at 354.

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[22] The Act is narrow and precise as it relates only to waivers of claims for conduct during the course of a repossession and not to waivers of claims for conduct subsequent to a repossession. The statutory reference to "any illegal act," however, is far from narrow and precise. To the contract draftsman this clearly would prohibit a waiver of claims for assault and battery, breaking and entering, breach of the peace, etc. during a repossession. It is not so clear, however, that such provision would apply to waivers of property rights or grants of licenses just because conduct taken pursuant to such a waiver of property right or trant of a license would be "illegal" in the absence of such a waiver or grant."

Again, *Bouie* is directly on point with *Zapata* and *Caskey*. Here, Art. 5069-7.07(4) has been expanded, not only by resort to an antiquated legal fiction, but by a fiction that has been expressly repudiated in every case to reach the Texas Supreme Court in recent years.

The significance of *Bouie* does not end with its discussion of the principles to be applied in testing "void-for-vagueness." The Court's application of those principles to the facts in *Bouie* is also informative in five respects.

First, neither the defendants in *Bouie* nor Appellants here have violated the pertinent statute as it was written. The trespass statute in *Bouie* expressly prohibited only the act of entering premises *in* the face of notice not to do so. There was "nothing in the statute to indicate that it also prohibited the different act of remaining on the premises after being asked to leave." 378 U.S. at 355. In *Zapata* and *Caskey*, the pertinent language of Art. 5069-7.07(4) prohibits only contractual waivers concerning illegal acts "committed in" a repossession. There is "nothing in the statute to indicate that it also prohibited the different act" of having contractual waivers concerning acts committed after a repossession.

Second, in *Bouie*, *Zapata* and *Caskey*, the prior case law gave no warning that the statute at issue would be expanded beyond its literal terms. In *Bouie*, 95 years of South Carolina cases construing the trespass statute at issue "uniformly emphasized the notice-before-entry requirement, and gave not the slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave." 378 U.S. at 356-57. Similarly, no prior Texas case has intimated that the prohibition against in-repossession waivers can be applied to post-repossession waivers, or that the outworn fiction of *trespass ab initio* can be applied in construing the Consumer

Credit Code. Indeed, Texas case law shows that the fiction is dead for any purpose.

The *Bouie* Court also distinguished several civil trespass cases which had been cited for the proposition that one may be liable for damages if one remains on premises after an order to leave, stating that:

> "It is one thing to say that a person remaining on another's land after being told to leave may be ejected with reasonable force or sued in a civil action, and quite another to say he may be convicted and punished as a criminal."

378 U.S. at 358. The *Bouie* Court noted the distinction between civil and criminal trespass and held that the civil doctrine was not only unrelated to the "particular statute" at issue, but to the entire field of punishment by resort to penal statutes. Therefore, such pre-existing civil law gave petitioners no warning that the trespass statute would be construed, despite its clear language to the contrary, as incorporating a doctrine found only in civil law. *Id.* at 359.

Analogously, *trespass ab initio* was a purely civil concept used to characterize a defendant's behavior when an actual trespass had occurred and compensation was sought for damages. In *Zapata* and *Caskey,* however, that concept was applied to construe a penal statute which imposes punishment completely divorced from any showing of real, threatened, or even perceived harm. The fiction of *trespass ab initio,* like the civil trespass cases in *Bouie,* is unrelated to the statute at issue, and indeed to the field of punishment by resort to penal statutes.[23]

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[23] Incredibly, the *Bouie* decision even referred to the *trespass ab initio* as an example of how civil law concepts which are used to adjust the rights of parties where a tort has occurred are not carried over into the administration of penal statutes. *Id.* at 358.

Third, in *Bouie, Zapata,* and *Caskey,* the case law of other jurisdictions also gave no warning of the judicial construction at issue. In *Bouie,* the Court concluded that:

> "The South Carolina Supreme Court's retroactive application of such a construction here is no less inconsistent with the law of other States than it is with the prior case law of South Carolina and, of course, with the language of the statute itself." 378 U.S. at 361.

Similarly, the overwhelming weight of case law outside Texas has rejected *trespass ab initio* fiction.

Fourth, in both *Bouie* and the present case, the pertinent state legislature had confirmed the error of the state court decision at issue. Shortly after the alleged trespass violation in *Bouie,* and prior to the State Supreme Court's expansion of the trespass statute, the South Carolina Legislature enacted a new trespass statute making it a criminal trespass to fail to leave premises after being ordered to do so. This Court concluded from that fact that it was obvious that the South Carolina Legislature did not believe that its original trespass statute covered such post-entry warnings, and did not anticipate the State Supreme Court's later expansion of the old law. 378 U.S. at 361-62.

In this case, the 1979 Texas Legislature adopted a statute (Art. 5069-7.07(7)) which governs the post-repossession dispositions of property taken during a repossession.[24] In

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[24] Art. 5069-7.07(7) provides as follows:

> No retail installment contract or retail charge agreement shall:
>
> (7) Contain an authorization for the seller or holder or any person acting on the seller's or holder's behalf to retain or dispose of other tangible personal property that is not subject to a security interest and that is acquired in the repossession of a motor vehicle, except property attached to the vehicles, unless the contract or a separate writing requires the seller or holder to send written notice of such an acquisition to the last known address of the buyer as shown by the records of the holder

so acting, the Legislature left Art. 5069-7.07(4) undisturbed. The Texas Legislature apparently believed that Section 7.07(4) did not cover post-repossession waivers.

The *Bouie* Court drew a further conclusion from the South Carolina Legislature's new trespass law, when it noted that:

> "We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal. Application of this rule is

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Footnote [24] continued:

> within fifteen days of the discovery of the personal property by the seller or holder. Such notice shall disclose to the buyer:
>
> (a) that the buyer may identify and claim the property at a reasonable time before the end of the thirtieth day after the day on which the notice was mailed or delivered; and
>
> (b) the location at which and reasonable times at which the buyer may identify and claim the property during that period.
>
> If a contract contains an authorization complying with this Section and such property is not claimed within the thirty days after the notice is mailed or delivered, the seller or holder may retain such property subject to any legal rights of buyer or dispose of such property in a reasonable manner and distribute any proceeds of such disposition according to applicable law.

> particularly compelling where, as here, the petitioners' conduct cannot be deemed improper or immoral. Compare *McBoyle* v. *United States,* 283 U.S. 25." 378 at 362.

Similarly, if the personalty provision at issue were tested under the new Section 7.07(7), a violation would be found and the Credit Code penalties could be imposed. Any such violation, however, would be invalid under the constitutional prohibition on *ex post facto* laws. Yet, the same prohibited result has been achieved by judicial construction in *Zapata* and *Caskey.*

Finally, the *Bouie* opinion stated that "in the last analysis" the case was controlled by the principle which Chief Justice John Marshall stated in *U.S.* v. *Wiltberger,* 18 U.S. (5 Wheat.) 593, 596 (1820):

> "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorise us to say so. *It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. . . .*" (emphasis added)

The *Bouie* decision concluded with a holding that the crime for which the petitioners stood convicted was "not enumerated in the statute" at the time of their conviction. They had therefore been deprived of due process of law. *Id.* at 363.

Appellants Ford Credit and Tradewinds Ford submit that a like conclusion must be reached here. The "crime" for which they stand convicted was "not enumerated in the

statute" at the time the contract was drafted. They have therefore been deprived of property without due process of law.

III.

THE TEXAS SUPREME COURT'S DECISION HERE THROWS OPEN TO ATTACK TENS OF THOUSANDS OF RETAIL INSTALLMENT CONTRACTS

The Texas Supreme Court's decisions in *Zapata* and *Caskey* not only reimpose the statutory penalties in those particular transactions, but also threaten to subject tens of thousands of other retail installment contracts to the severe Credit Code penalties. To begin with, all contracts used in Texas by Ford Credit that contain the personalty provision at issue are now placed in jeopardy. As noted above, the heavy penalties of the Consumer Credit Code may be imposed in *each* individual installment transaction, without regard to the existence of any real harm.

The impact of the state Supreme Court's treatment of the Credit Code may also extend far beyond even the many Ford Credit contracts which are directly threatened. In effect, the State Court has held that the express standards of a penal statute may be disregarded whenever a Court confronts a contract provision which it dislikes. The dangers of such subjective application of the law was recognized by this Court in *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) where the Court stated that:

> "... if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Under a system which allows a finding of violation on a subjective basis without regard to the statute itself, contract drafters will be subject to punishment at the pleasure of a judge for failure to meet his retroactively formed expectations. In that situation, Art. 5069-7.07(4), as applied, would be precisely that type of statute which the United States Supreme Court condemned in *Smith* v. *Goguen*, 415 U.S. 566 (1974):

> "[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." (at p. 573, fn. 9)

In analogous contexts, this Court has refused to allow the federal Truth-in-Lending Act to be converted into such a windfall mechanism. Instead, this Court has insisted on a careful analysis of the plain words of the statute and of the Legislature's intent. *See e.g., Anderson Brothers Ford* v. *Valencia*, 49 U.S.L.W. 4635 (U.S. June 8, 1981). The Texas Supreme Court has rejected such a reasoned approach, and in so doing has violated Appellants' constitutional rights.

CONCLUSION

The decisions of the Texas Supreme Court in *Zapata* and *Caskey* expand the reach of the Texas Consumer Credit without fair notice or warning of its novel application, and thus renders that statute unconstitutional as applied. Those decisions threaten tens of thousands of Texas contracts drafted with no reasonable expectation that, because of an obsolete legal fiction, a penal statute was being violated. This Court should therefore intervene to protect Appellants' constitutional rights.

Respectfully submitted,

Original Signed By
RANDALL A. HOPKINS

RANDALL A. HOPKINS
Counsel of Record for Appellants

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Jurisdictional Statement has been sent to all parties required to be served herein, including C. M. Henkel, III, 520 Guaranty Bank Plaza, Corpus Christi, Texas 78475, and the Attorney General of the State of Texas, Courts Building, Post Office Box 12548, Capitol Station, Austin, Texas 78711. Said copies were sent by certified mail, return receipt requested, on this 3rd day of September, 1981.

Original Signed By
RANDALL A. HOPKINS

RANDALL A. HOPKINS

APPENDIX A

DON B. CASKEY, *et al.*,

v.

TRADEWINDS FORD SALES, INC., *et al.*

No. B-9617

Supreme Court of Texas

May 13, 1981.

Rehearing Denied June 13, 1981.

From Nueces County, Eleventh District.

Opinion of CCA, 600 S.W.2d 865.

Under the provisions of Rule 483, T.R.C.P., the application for writ of error is granted and without hearing oral argument, the judgment of the Court of Civil Appeals is reversed and the judgment of the trial court is affirmed. (Per curiam opinion.)

PER CURIAM

Don B. Caskey and Ralph E. Caskey sued Tradewinds Ford Sales, Inc., Ford Motor Credit Company and Ford Motor Company alleging violations of the Texas Consumer Credit Code in connection with their purchase of a 1978 Ford Thunderbird. The trial court granted the Caskeys' motion for partial summary judgment against Tradewinds Ford Sales, Inc. The court of civil appeals reversed the judgment of the trial court and rendered judgment that Caskey take nothing. 600 S.W.2d 865. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

The retail installment contract involved in this case contained a waiver clause which provided:

Any personalty in or attached to the property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession.

In upholding the validity of the waiver provision the holding of the court of civil appeals conflicts with section 7.07(4) of the Consumer Credit Code. *Zapata* v. *Ford Motor Credit Company*, ... S.W.2d .... (Tex. 1981). 24 Tex. Sup. Ct. J. 377 (May 9, 1981).

The Caskeys raised several other points alleging various violations of the Code. We find it unnecessary, however, to discuss the other points since a single violation of the Code will trigger the penalties under section 8.01.

We grant the application for writ of error and without hearing oral argument reverse the judgment of the court of civil appeals and affirm the judgment of the trial court. Tex.R.Civ.P. 483.

Opinion delivered May 13, 1981.

APPENDIX B

ARNULFO ZAPATA,

Petitioner,

v.

FORD MOTOR CREDIT COMPANY, *et al.*,

Respondents.

No. B-9889.

Supreme Court of Texas

May 6, 1981.

Rehearing Denied June 3, 1981.

McGEE, Justice.

Arnulfo R. Zapata sued Yates Ford, Inc. and Ford Motor Credit Company (FMCC) for statutory penalties, alleging that certain provisions in a retail installment contract violate the Texas Consumer Credit Code.[1] The trial court granted Zapata's motion for partial summary judgment and, after a nonjury trial on the issue of attorney's fees, rendered final judgment against Yates Ford and Ford Motor Credit Company. The court of civil appeals reversed

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[1] Title 79 (Article 5069, Tex. Rev. Civ. Stat. Ann.) is not a code which has been promulgated pursuant to this State's continuing statutory revision program. However, for convenience and clarity we will refer to Article 5069 throughout this opinion as the "Credit Code" or "Code." All statutory references are to sections under Article 5069, unless otherwise noted. All emphases are ours.

the judgment of the trial court and rendered judgment that Zapata take nothing. 605 S.W.2d 362 (Tex.Civ.App.1980). We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

On July 15, 1976, Zapata purchased a new pickup truck from Yates Ford in Austin, Texas. He financed the purchase by executing a retail installment contract which was later assigned to FMCC. The contract was on a preprinted form prepared and supplied by FMCC. Twenty-six months later, in September 1978, Zapata sued to recover a $2,000 statutory penalty and reasonable attorney's fees under section 8.01(b) for violations of the Credit Code.[2] When suit was filed, Yates Ford and FMCC had not repossessed or attempted to repossess the truck; Zapata was current in his obligations under the contract, and Zapata claimed no actual damages. The recovery sought by Zapata is purely penal in nature.

Zapata moved for a partial summary judgment. He alleged the retail installment contract contained seven violations of the Credit Code.[3] The trial court granted the

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[2] Section 8.01(b) provides:

"(b) Any person who violates this Subtitle or Chapter 14 of this Title by (i) failing to perform any duty or requirement specifically imposed on him by any provision of this Subtitle or Chapter 14 of this Title, or by (ii) committing any act or practice prohibited by this Subtitle or Chapter 14 of this Title, shall be liable to the obligor for a penalty in an amount equal to twice the time price differential or interest contracted for, charged, or received but not to exceed $2,000 in a transaction in which the amount financed is $5,000 or less. . . ."

[3] Zapata alleged the retail installment contract violated the Credit Code in the following respects: (1) failure to clearly and conspicuously disclose the amount charged for the mechanical breakdown insurance in violation of Article 5069-7.06(8); (2) overcharge of the license, title and registration fees which is unauthorized by Article 5069-7.01(f); (3) false labeling of required insurance as optional insurance in violation of Article 5069-7.06(3); (4) failure to properly identify Ford Motor Credit Com-

motion and assessed a $2,000 penalty against Yates Ford and FMCC but did not say on which violation it based its ruling. After a trial on the issue of attorney's fees, the trial court rendered final judgment against Yates Ford and FMCC, jointly and severally, for a $2,000 penalty and $5,000 in attorney's fees. The court of civil appeals reversed the judgment and rendered judgment that Zapata take nothing. The court of civil appeals ruled against Zapata on each alleged violation.

We granted Zapata's application for writ of error on two points of error. In the first point, Zapata contends the waiver clause in paragraph nineteen (19) of the retail installment contract violates section 7.07(4) of the Code. This section prohibits waiver of buyer's rights of action against a seller in installment contracts for illegal acts committed in the repossession of a motor vehicle. In the second point, he argues the retail installment contract fails to "clearly and conspicuously" disclose that physical damage insurance is required in violation of section 7.06(3) of the Code. We hold the waiver clause violates section 7.07(4). Thus, we find it unnecessary to discuss Zapata's point concerning a violation of section 7.06(3) because a single violation of the Code will trigger the penalties under section 8.01.

The waiver clause is found in paragraph nineteen (19) on the back of the contract. It provides:

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pany as a creditor in violation of Art. 5069-14.11(a); (5) improperly reserving a security interest in unearned premiums on the reverse side of the contract in violation of Art. 5069-14.17(a)(1); (6) including the overcharge of the license, title and inspection fee charged in the Amount Financed thereby charging an undisclosed finance charge in violation of Article 5069-14.04; (7) waiver of the act of illegally converting personalty committed in connection with repossession of the collateral, in violation of Article 5069-7.07(4).

"Any personality in or attached to the property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

Zapata contends the second part of the waiver clause, which provides ".... Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession," violates section 7.07(4) of the Code. He relies on *Southwestern Investment Company* v. *Mannix*, 557 S.W.2d 755 (Tex. 1977), and *Ford Motor Credit Company* v. *Cole*, 503 S.W.2d 853 (Tex. Civ. App. — Fort Worth 1973, writ dism'd).

Section 7.07(4) provides:

"No retail installment contract or retail charge agreement shall:

"(4) *Provide for a waiver of the buyer's rights of action against the seller or holder* or other person acting therefor *for any illegal act committed*, in the collection of payments under the contract or agreement or *in the repossession of a motor vehicle;* ..."

In *Southwestern Investment Company* v. *Mannix, supra*, the question was whether a provision in a retail installment contract of goods violated section 6.05(4) of the Code. The statutory language in section 6.05(4) is identical to the statutory in section 7.07(4). However, section 6.05(4) applies to retail installment sales of goods generally and section 7.07(4) applies exclusively to motor vehicle installment sales. The contract provision in *Mannix* provided:

"Nothing shall prevent the Secured Party from removing [the property] from any premises to which same may

be attached, upon default or breach of this Retail Installment Contract and Security Agreement or any part thereof, and the Debtor agrees to sustain the cost of repairs, if any, of any physical injury to the real estate caused by such removal."

In *Mannix*, we held this provision violated section 6.05(4) because it waived a buyer's right of action for a tort committed in the repossession of goods. We explained the Legislature intended for such unconscionable contract provisions to be unforceable and to penalize creditors for including these provisions in installment contracts.

In *Ford Motor Credit Company* v. *Cole, supra*, the same waiver clause was before the Fort Worth Court of Civil Appeals. That was a venue case where the court stated it would not be permissible to construe the waiver clause to exempt Ford Motor Credit Company from liability should it convert or deprive the buyer of use of unsecured property. This construction of the clause, the court concluded, would be unenforceable as contrary to the public policy of this State.

The parties concede the first part of the waiver clause, which provides "[a]ny personalty in or attached to the property when repossessed may be held by Seller without liability . . . ," merely restates the bailor-bailee relationship existing at common law with respect to personalty in a repossessed vehicle. However, a person in lawful possession of personalty may still be guilty of trespass or conversion for its unlawful detention. A detention of personalty lawfuly obtained, after demand, is a wrongful act constituting a trespass. *Brite* v. *Pfeil*, 334 S.W.2d 596 (Tex. Civ.App. — San Antonio 1960, no writ); *see Mountain States Tel. & Tel. Co.* v. *Vowell Construction Co.*, 161 Tex. 432, 341 S.W.2d 148 (1960). The commission of a trespass does not necessarily mean the actor will be liable for dam-

ages. Restatement (Second) of Torts § 217, Comment a (1965). Liability does not attach, unless the wrongful detention is accompanied by actual damage to the property or deprives the owner of its use for a substantial period of time. *See Lyle* v. *Waddle,* 144 Tex. 90, 188 S.W.2d 770 (1945); Restatement (Second) of Torts § 218 (1965). Even in the absence of damages, a trespass has occurred which is important in determining the legal relations between the parties.[4]

If the wrongful detention seriously interferes with the owner's right to control the personalty, there is not only a trespass but a conversion which justifies an action to require the actor to pay the full value of the personalty. *Smith* v. *Texas & N. O. Ry. Co.,* 101 Tex. 405, 108 S.W. 819 (1908); *Norris* v. *Bovina Feeders, Inc.,* 492 F.2d 502 (5th Cir. 1974). Section 237 of the Restatement of Torts (Second) reads: "One in possession of a chattel as bailee or otherwise who, on demand, refuses without proper qualification to surrender it to another entitled to its immediate possession, is subject to liability for conversion." Trespass and conversion are torts designed to protect against interferences with one's possessory interest in personalty. They are "illegal acts" within the meaning of section 7.07(4) of the Credit Code. *See Southwestern Investment Company* v. *Mannix, supra.*

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[4] Comment a to § 217 of the Restatement (Second) of Torts states in part:

> "A trespass, though not actionable . . ., may nevertheless be important in the determination of the legal relations of the parties. Thus, the fact that one person is committing a trespass to another's chattel, while it may not be actionable because it does no harm to the chattel or to any other legally protected interest of the possessor, afford the possessor a privilege to use force to defend his interest in its exclusive possession . . . . So too, the fact that one person is a trespasser is important in determining the duty of care owing to him by the possessor of the chattel . . . ."

The waiver clause in this case waives a buyer's right of action for the wrongful detention of unsecured personalty taken in the repossession of a motor vehicle. If the buyer fails to demand his property within 24 hours after repossession, all claims for its subsequent wrongful detention are waived. The fact the wrongful detention waived does not occur until at least 24 hours "after repossession" and not "in the repossession" as stated in section 7.07(4) is immaterial because the doctrine of trespass ab initio is followed in Texas. *See Humphreys Oil Co.* v. *Lile,* 262 S.W. 1058 (Tex.Civ.App.—Waco 1924), *aff'd,* 277 S.W. 100 (Tex. Comm'n. App. 1925, judgment adopted); *Brite* v. *Pfeil, supra, American Mortgage Corp.* v. *Wyman,* 41 S.W.2d 270 (Tex.Civ.App.—Austin 1931, no writ); and *Lyles* v *Meyer,* 293 S.W. 295 (Tex.Civ.App.—San Antonio 1927, writ ref'd). Under this doctrine, a wrongful detention of unsecured personalty 24 hours after repossession, by one in lawful possession, is a trespass from the time of repossession. *Id.* This waiver clause is not only contrary to public policy, see *Ford Motor Credit Company* v. *Cole, supra,* but it is also prohibited by section 7.07(4) of the Credit Code.

Yates Ford and FMCC argue that the waiver clause does not waive a buyer's "right of action" but merely his claim to the personalty in the reposseessed vehicle. They also urge the word "deemed" in the waiver clause only amounts to a rebuttable presumption of a waiver and not a conclusive presumption. The use of the word "deemed" and "claim" does not save a contract clause which otherwise violates section 7.07(4). The construction placed upon this contract language by Yates Ford and FMCC is contrary to the express legislative intent in enacting the Credit Code.

We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

APPENDIX C

TRADEWINDS FORD SALES, INC., *et al.*,

Appellants,

v.

DON B. CASKEY, *et al.*,

Appellees.

No. 5395.

Court of Civil Appeals of Texas, Eastland.

April 24, 1980.

Rehearing Denied June 5, 1980.

RALEIGH BROWN, Justice.

The issue for determination is whether a vehicle installment sales contract is in violation of the Texas Consumer Credit Code.[1] Tex.Rev.Civ.Stat.Ann. art. 5069-2.01 et seq. (Vernon Pamphlet Supp.1979).

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[1] We note that Title 79 (Article 5069, Tex.Rev.Civ.Stat.Ann.) is not a code which has been promulgated pursuant to this state's continuing statutory revision program. However, for convenience and clarity we will refer to Article 5069 throughout this opinion as the "Code," "Texas Consumer Credit Code," or "Consumer Credit Code."

Don B. Caskey and Ralph E. Caskey sued Tradewinds Ford Sales, Inc. Ford Motor Credit Company and Ford Motor Company alleging violations of the Texas Deceptive Trade Practices-Consumer Protection Act, the Texas Consumer Credit Code and the Federal Consumer Protection Act in connection with their purchase of a 1978 Ford Thunderbird. The automobile was financed by the Caskeys' execution of a retail installment contract with Tradewinds, which was later assigned to Ford Credit. Ford Credit and Tradewinds filed a counterclaim against the Caskeys alleging breach of contract for their failure to make payments. After the Deceptive Trade Practices portion of the suit was severed, removing Ford Motor Company from the instant case, a partial summary judgment was rendered against Tradewinds and Ford Credit for eight violations of the Texas Consumer Credit Code. Trial was then to the court on the remaining issues of attorney's fees; additional alleged violations of the Texas Consumer Credit Code; alleged violations of the Federal Truth-in-Lending Act; and alleged violations of Federal Reserve Regulation Z. Judgement was rendered in favor of the Caskeys against Tradewinds and Ford Credit for statutory penalties under the Texas Consumer Credit Code, including attorney's fees, for the eight violations thereof; recovery was denied under the Federal Truth-in-Lending Act, Federal Reserve Regulation Z[2] and the alleged additional violations of the Texas Consumer Credit Code. The Caskeys were found to have been in default on their contractual obligations, but because of the violations of the Texas Consumer Credit Code, Tradewinds and Ford Credit were denied recovery on their counterclaim. Tradewinds and Ford Credit appeal. We reverse and render.

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[2] See *Ford Motor Credit Co.* v. *Milhollin*, – U.S. —, 100 S.Ct. 790, 63 L.Ed.2d 22 (1980).

In fourteen points of error, Tradewinds and Ford Credit contend that the trial court erred in granting judgment for the Caskeys because the installment contract did not violate the Consumer Credit Code in the specific instances found by the court.[3] Appellants also urge that the

[3] The majority of the alleged violations are found in paragraphs 19 and 20 of the contract which provide:

19. DEFAULT

Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or Seller in good faith believes that the prospect of payment or performance hereunder is impaired. Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have the right to repossess the property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Upon request. Buyer shal deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency. Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless writen demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay reasonable attorneys' fees (15% if permitted by law) and other expenses incurred by Seller in effecting collection, repossession or resale hereunder, Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

20. GENERAL

No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibtied by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state in which the original Seller is located as shown on the face of this contract.

court erred in refusing to grant judgment on their counterclaim.

Since the provisions of the Consumer Credit Code are penal in nature, these provisions will be strictly construed. *Commerce Trust Company* v. *Best* 124 Tex. 583, 80 S.W.2d 942, 946 (1935): *Hight* v. *Jim Bass Ford*, 552 S.W.2d 490, 491 (Tex.Civ. App.—Austin 1977, writ ref'd n.r.e.). Also, any doubt as to be intention of the legislature to purnish the conduct of the appellant should be resolved in favor of that party. *Gulf, Colorado & S. F. Ry. Co.* v. *Dwyer*, 84 Tex. 194, 19 S.W. 470 (1892).

ACCELERATION OF MATURITY OF INDEBTEDNESS

The trial court concluded that the contract violated the Texas Consumer Credit Code by:

> 1. [C]ontractually allowing the Seller in paragraph 19 of the Retail Installment Contract to accelerate the maturity of the contract under conditions expressly prohibited in that same may be accelerated if the Buyer fails to comply with any provisions of the contract, all contrary to Section. 7.07(1) of the Texas Consumer Credit Code.

Ford Credit and Tradewinds argue that the contract did not provide for acceleration of maturity of the indebtedness under conditions expressly prohibited by the Consumer Credit Code. We agree.

Article 5069-7.07(1) of the Code provides:

No retail installment contract or retail charge agreement shall:

> (1) Provide that the seller or holder may accelerate the maturity of any part or all of he amount owing thereunder unless (a) the buyer is in default on the

performance of any of his obligations or (b) the seller or holder in good faith believes that the prospect of payment or performance is impaired.

Paragraph 19 of the contract allows the unpaid balance to be declared immediately due and payable in four specified instances:

(1) When the buyer defaults in any payment.

(2) When the buyer fails to obtain or maintain required insurance.

(3) When the buyer fails to comply with any provision of the contract.

(4) When the seller in good faith believes that the prospect of payment or performance is impaired.

We hold that none of the provisions listed above violates the Code in the manner found by the trial judge. A creditor has the right to contract for acceleration of the date of maturity when the buyer has defaulted in his obligation to make timely payments. *Ramo, Inc.* v. *English*, 500 S.W.2d 461, 466 (Tex. 1973); *Motor & Industrial Finance Corporation* v. *Hughes*, 157 Tex. 276, 302 S.W.2d 386, 394 (1957). Also, with regard to the insurance requirement, Articles 5069-7.06(1) and 7.02(2) of the Code specifically permits a seller to require the maintenance of credit life or property insurance. Furthermore, Article 5069-7.07(1)(a) expressly permits acceleration when "the buyer is in default on the performance of any of his obligations." Default in any payment and failure to obtain or maintain required insurance are clearly defaults in the performance of the buyer's obligations and thus are instances in which acceleration is expressly permitted by the Code.

The provision permitting acceleration if the buyer fails to comply with any provision of the contract essentially

repeats the language of Article 5069-7.07(1)(a) and thus does not violate the Code. Nor do we find any violation in the provision which permits acceleration when the seller "in good faith believes that the prospect of payment or performance is impaired." This provision merely repeats the language found in Article 5069-7.07(1)(b) and does not violate the code.

UNLAWFUL ENTRY AND BREACH OF THE PEACE COMMITTED IN REPOSSESSION

The trial court also concluded that the contract violated Article 5069-7.07(3)[4] of the Texas Consumer Credit Code by:

> 2. (C)ontractually allowing the Seller, pursuant to the terms of paragraph 19 of the Retail Installment Contract to enter upon Buyer's premises unlawfully and to commit a breach of peace in effecting repossession of the property, contrary to Section 7.07(3) of the Texas Consumer Credit Code in the following respects:
>
> (a) By giving the Seller the right to repossess the property wherever the same may be found with free right of entry.
>
> (b) By giving the Seller the right to retain personalty in or attached to the property when repossessed.[5]

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[4] Article 5069-7.07(3) provides:

> No retail installment contract or retail charge agreement shall:
>
> • • • •
>
> (3) Authorize the seller or holder or other person acting on his behalf to enter upon the buyer's premises unlawfully or to commit any breach of the peace in the repossession of a motor vehicle.

[5] The right to retain personalty will be discussed under the heading of WAIVER OF BUYER'S RIGHTS OF ACTION, intra.

Appellants urge that the parties have not agreed that appellants could enter appellees' premises unlawfully and commit a breach of the peace in effecting repossession of the collateral. It is appellants' position that the contract permits repossession only if seller finds the collateral at a place where "free right of entry" exists. They contend that such "right of entry" is determined by rights given under the Texas Business & Commerce Code and, therefore, the language does not attempt an unlawful expansion of the seller's legal repossession rights or excuse an unlawful entry.

The contract provides in the event of default, "Seller shall have the right to repossess the Property whereever the same may be found with free right of entry . . . . Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

Appellants argue that the contract provision refers to the remedy of repossession specifically conferred by Tex. Bus. & Com. Code Ann. § 9.503 (Vernon Supp. 1980) which provides in part:

> Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

The Caskeys contend that the language of the contract which gives the seller the right of repossession of the property "wherever the same may be found" gives seller a remedy beyond that allowed in the Texas Business & Commerce Code and, as a result, violates the Texas Consumer Credit Code.

In construing this contract we must apply the rule as stated in *Piper, Stiles & Ladd* v. *Fidelity and Deposit Compan of Maryland*, 435 S.W.2d 934 (Tex. Civ. App. — Houston (1st Dist.) 1968, writ ref'd n.r.e.):

> It is the duty of the court to look to the entire instrument so that the effect or meaning of one part on any other part may be determined.

In addition, we must presume "that in contracting parties intend to observe and obey the law." *Nevels* v. *Harris*, 129 Tex. 190, 102 S.W.2d 1046 (1937); *Walker* v. *Temple Trust Co.*, 124 Tex. 575, 80 S.W.2d 935, 936 (Com.App.1935, opinion adopted).

Applying these rules, we hold the phrase "free right of entry" qualifies or limits the phrase "wherever the same may be found," and authorizes the seller to enter only where he has free right of entry. Thus, the contract does not authorize appellants to enter appellees' premises unlawfully and commit a breach of the peace in effecting repossession of the collateral.

WAIVERS OF BUYER'S RIGHTS OF ACTION

The trial court also concluded that the contract violated Article 5069-7.07(4)[6] of the Code by:

> 3. (C)ontractually providing in paragraph 19 of the Retail Installment Contract for a waiver of Buyer's

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[6] Article 5069-7.07(4) provides:

> No retail installment contract or retail charge agreement shall:
>
> * * * * * *
>
> (4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossessions of a motor vehicle.

rights of action against Seller or holder or any other person acting therefor for any illegal act committed in the repossession of the motor vehicle, all contrary to Section 7.07(4) of the Texas Consumer Credit Code in the following respects:

(a) By giving the Seller the right to repossess the property wherever the same may be found with free right to entry.

(b) By giving the Seller the right to retain all payments made prior to repossession.

(c) By giving the Seller the right to retain personalty in or attached to the property when repossessed without liability to the Seller.

(d) By requiring the Buyer to waive his rights to personalty in or attached to the property when repossessed.

(e) By requiring the Buyer to agree to pay "other expenses" incurred by the Seller in effecting collection, repossession or resale of the property.

Ford Credit and Tradewinds contend that paragraph 19 of the installment contract does not violate Article 5069-7.07(4) of the Texas Consumer Credit Code because it does not provide for a waiver of buyer's right of action against any person for illegal acts committed in the repossession of the motor vehicle.

However, the Caskeys argue, and the trial court so found: that the right to retain installment payments made prior to repossession; the provision that seller must pay "other expenses" incurred in effecting collection, repossession or resale of the property; and the provision that seller may hold, without liability, any personal property contained in in the vehicle at the time of repossession all violate Article 5069-7.07(4). They contend these provisions amount to a waiver of the buyer's right of action for certain "illegal acts." We disagree.

The Caskeys have failed to point to any Texas law which makes it illegal to retain payments made prior to repossession of the collateral. Tex.Bus. & Com.Code Ann. § 9.504 (Vernon 1968) requires that a debtor in default receive any surplus funds remaining from a secured party's post-repossession disposition of collateral. However, this reimbursement is not made out of previously tendered installment payments, but from excess funds, if any, remaining after the secured party's disposition of the collateral. Retention of payments made prior to disposition of collateral is not an illegal act. Therefore, the contract provision permitting the seller to retain all payments made prior to repossession does not constitute a waiver of the Caskey's right of action for an illegal act committed in the repossession of the motor vehicle.

We also disagree with the trial court's conclusion that requiring the Buyer to pay "other expenses" is a waiver of a buyer's right of action. Article 5069-7.03(6) expressly permits a seller to charge a delinquent buyer for expenses incurred as a result of default. That article provides in part:

> In addition, such contracts may provide for the payment of an attorney's reasonable fee where it is referred for collection to an attorney not a salaried employee of the seller or holder of the contract, and for court costs and disbursements, and in the event of repossession, sequestration or other action necessary to secure possession of a motor vehicle securing the payment of a retail installment contract, such contracts may provide for the charge and collection of actual and reasonable out-of-pocket expenses incurred in connection with such repossession or foreclosure, including costs of storing, reconditioning and reselling such motor vehicle, subject to the standards of good faith and commercial reasonableness set by the Uniform Commercial Code as adopted in Texas.

The contract provision requiring buyer to pay "other expenses" incurred by seller in effecting collection, repossession or resale of the property is therefore lawful under the express terms of the Consumer Credit Code.

We also disagree with the conclusion that the retention of personalty is an illegal act committed in the repossession of a vehicle. Articles 5069-7.07(3) and 7.07(4) refer to acts committed "in the collection of payments" or "in the repossession of a motor vehicle." Since the language in these articles is plain, unambiguous, and clear, it will be given effect as written. *Gateley* v. *Humphrey,* 151 Tex. 588, 254 S.W. 98 (1952); *Col-Tex Refining Co.* v. *Railroad Commission of Texas,* 150 Tev. 340, 240 S.W.2d 747 (1951).

The retention of personalty in or attached to a vehicle is an act which occurs after repossession. There is no reference in the Code to acts which occur after repossession. If the Legislature had intended to prohibit the waiver of rights of action for all "illegal acts," including acts committed after repossession, "it would have been a simple matter to have so stated." *See First State Bank of Bedford* v. *Miller,* 563 S.W.2d 572, 577 (Tex. 1978). Therefore, even if retention of the personalty after repossession is an illegal act, a matter we are not required to consider, neither Article 5069-7.07(3) nor 7.07(4) covers alleged illegal acts committed after repossession.

BUYER'S AGREEMENT NOT TO ASSERT ANY CLAIMS OR DEFENSES

The trial court also concluded that the contract violated the Code by:

> 4. (C)ontractually providing in paragraph 20 of the Retail Installment Contract that any illegal aspect of the Contract is ineffective and thus requires Buyer to agree not to assert against the Seller any claims or

> defenses arising out of the sale of the property, contrary to Section 7.07(6) of the Texas Consumer Credit Code.

Article 5069-7.07(6) provides: No retail installment contract or retail charge agreement shall:

> (6) Provide that the buyer agrees not to assert against the seller or holder of any claim or defense arising out of the sale.

The trial court concluded that the following sentence, found in paragraph 20 of the contract, violates the Code: "Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract." The court held such provision was an agreement by the buyer not to assert against the seller any claim or defense arising out of the sale. We disagree.

The provision does not provide exemptions under which the seller may escape liability from the penalties provided by Article 5069. It says nothing about what the buyer may or may not assert by way of a lawsuit. The provision only says that the entire contract is not invalidated merely because it contains a legally prohibited provision. It is a "savings provision" for all valid portions of the contract. It does not prohibit the buyer from asserting against the seller or holder any claim or defense arising out of the sale.

UNEARNED FINANCE CHARGES

The trial court also found that the contract violated the Code by:

> 5. (C)ontractually allowing the Seller pursuant to to paragraph 19 of the Retail Installment Contract, to accelerate upon default "all amounts due or to

become due hereunder to be immediately due and payable" without the allowance or deduction of unearned finance charges as required under Section 7.04 of the Texas Consumer Credit Code.

6. By contracting, pursuant to paragraph 19 of the Retail Installment Contract for interest and time price differential which is in the aggregate in excess of double the total amount of charges authorized by Section 7.03 of the Texas Consumer Credit Code in that Seller is authorized to declare "all amounts due or to become due hereunder to be immediately due and payable."

Ford Credit and Tradewinds urge that the trial court erred in concluding that the contract allowed the seller to accelerate upon buyer's default "all amounts due or to become due" without the allowance or deduction of unearned finance charges as required under Article 5069-7.04 of the Texas Consumer Credit Code. Also, they contend the court erred in concluding that such language contracted for interest and time price differential in excess of double the total amount of charge authorized by Article 5069-7.03 of the Code.

The Caskeys contend that, in the event of acceleration, the contract gives the Seller the right to collect finance charges which have not yet been earned. They argue that if the date of maturity is accelerated and the total unpaid finance charges then become due, those charges will exceed the limits authorized by Article 5069-7.03.

In considering whether a contract is illegal because of its acceleration clause, we will apply the rule as reannounced in *Smart* v. *Tower Land and Investment Company*, 597 S.W.2d 333, 340 (Tex.Sup., 1980), to the effect:

In *Walker* v. *Temple Trust Co.*, 124 Tex. 575, 80 S.W.2d 935 (1935) this court stated:

> "While of course courts have no right to depart from the terms in which the contract is expressed to make legal what the parties have made unlawful, nevertheless when the contract by its terms, construed as a whole, is doubtful, or even susceptible of more than one reasonable construction, the court will adopt the construction which comports with legality. It is presumed that in contracting parties intend to observe and obey the law. For this reason the court will not hold a contract to be in violation of the usury law unless, upon a fair and reasonable interpretation of all its terms, it is manifest that the intention was to exact more interest than allowed by law. "(T)he rule should be, as clearly recognized in motion for rehearing in the *Shropshire* Case (*Shropshire* v. *Commerce Farm Credit Co.*, 120 Tex. 400, 30 S.W.2d 282, 39 S.W.2d 11, 84 A.L.R. 1269), that unless the contract by its express and positive terms evidences an intention which requires a construction that unearned interest was to be collected in all events, the court will give it the construction that the parties intended that the unearned interest should not be collected."

See also *Spanish Vilage, Ltd.* v. *American Mortgage Company*, 586 S.W.2d 195 (Tex.Civ.App. — Tyler 1979, writ ref'd n. r. e.); Annot., 66 A.L.R.3d 650, 676 (1975).

There is no clear, convincing language in the contract under examination, and particularly in paragraph 19, that the collection of unearned finance charges was intended. We therefore presume that the contracting parties intended to observe and obey the law and thus no violation of Article 5069-7.03 and 7.04 is shown.

BUYERS' NAMES AND ADDRESSES

The trial court concluded that the contract violated the Code by:

7. (N)ot containing the names and addresses of both Buyers as required by Section 7.02(5) of the Texas Consumer Credit Code.

We hold the contract did not fail to contain the names and addresses of both buyers as required by Article 5069-7.02(5)[7] of the Texas Consumer Credit Code. The contract contains the addresses of both buyers, 909 Rambler, Corpus Christi, Texas. While Don Caskey's name does not appear at the top of the contract, it is typed in at the middle of the front side of the contract and the signatures of both buyers appear at the botton of the contract. Under these circumstances, the contract is in substantial compliance with and satisfies the purpose of Article 5069-7.02(5) of the Texas Consumer Credit Code. *Hight* v. *Jim Bass Ford, Inc.*, 552 S.W.2d 490 (Tex. Civ. App. — Austin 1977, writ ref'd n.r.e.).

DISCLOSURE OF PRINCIPAL BALANCE

Finally, the trial court concluded that the contract violated the Code by:

8. (N)ot stating the principal balance as required by Section 7.02(6)(f) of the Texas Consumer Credit Code.

Appellants argue that the trial court erred in granting judgment for the appellees because the contract did state the principal balance as required by Article 5069-7.02(6)(f).[8]

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[7] Article 5069-7.02(5) provides:

(5) The retail installment contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or other address of the buyer as specified by the buyer, and a description of the motor vehicle sold or to be sold.

[8] Article 5069-7.02(6) provides in part:

(6) The retail installment contract shall specifically set out the following items:

(a) The cash sale price of the motor vehicle;

The details of the transaction set forth in the contract include in part:

(1)	Cash Price		$8,321.00
	Cash Down Payment	$800.00	
	Trade-In	$960.67	
(2)	Total Down Payment		$1,760.67
(3)	Unpaid Balance of Cash Price (Difference between Items 1 & 2)		$6,560.33
(4)	Other Charges		
	Optional Insurance	$473.64	
	Official Fees	none	
	Taxes (not included in Cash Price)	$293.01	
	License, Title & Registration Fees	$ 23.80	
	Total Other Charges		$ 790.45
(5)	Unpaid Balance — Amount Financed (Sum of Items 3 & 4)		$7,350.78

(b) The amount of the buyer's down payment, if any, specifying the amounts paid in money and in goods traded in;

(c) The difference between items (a) and (b);

(d) The aggregate amount, if any, included for insurance if a separate identified charge is made therefor, specifying the type or types and the term of coverage;

(e) The aggregate amount of official fees, if a separate identified charge is made therefor;

(f) The principal balance, which is the sum of items (c), (d) and (e);

(g) The amount of the time price differential; and

(h) The sum of items (f) and (g), which is the balance to be paid by the buyer to the seller, the number of installments, the amount of each installment and the due date or period thereof.

The Caskeys' argument as to this alleged violation of the Texas Consumer Credit Code is that the principal balance disclosed in the contract is inaccurate because it includes an amount representing taxes, license, title and registration fees. There is no claim that the taxes and fees as itemized on the contract are incorrect; nor is there any claim that the taxes and fees could not be financed.

We hold that the contract did not fail to state the principal balance as required by Article 5069-7.02(6)(f). The principal balance is defined in Article 5069-7.02(6)(f) as the cash sale price less downpayment plus insurance charges plus official fees. Article 5069-7.01(f) expressly permits a seller to include taxes, registration, certificate of title, and license fees in the cash sale price. Since the cash sale price is a component of the principal balance, these fees can be included in computing the principal balance.

With regard to the cross-action filed by Tradewinds Ford Sales, Inc., and Ford Motor Credit Company, the trial court found that the Caskeys were in default in their obligations since they had made no payment under the contract, and at the time of the hearing the amount due and owing Tradewinds and Ford Motor Credit by Don and Ralph Caskey was $8,329.66 plus attorney's fees as provided in the contract. However, recovery was denied on this cross-atcion because of the violations of the Consumer Credit Code found by the trial court. Since we hold there have been no violations of the Code, Tradewinds and Ford Motor Credit are entitled to recover on their cross-action.

The judgment of the trial court is reversed and judgment rendered that Tradewinds Ford Sales, Inc., and Ford Motor Credit Company recover the sum of $8,329.66 plus $1,249.45 attorney's fees and interest and that Don B. Caskey and Ralph E. Caskey take nothing.

APPENDIX D

NO. 77-4531-F

DON B. CASKEY and RALPH E. CASKEY		IN THE DISTRICT COURT OF
V.		NUECES COUNTY, TEXAS
TRADEWINDS FORD SALES, INC., FORD MOTOR CREDIT COMPANY and FORD MOTOR COMPANY		214TH JUDICIAL DISTRICT

JUDGMENT

RECORDED:
VOLUME 8
PAGES 929/931

In the absence of Application for Trial by Jury, came on for hearing before this Court on October 16, 1978, those matters remaining before the Court after its granting of the Partial Motion for Summary Judgment herein which was signed and entered on the 16 day of October, 1978. Plaintiffs, Don B. Caskey and Ralph E. Caskey, appeared in person and by attorney. Defendant, Tradewinds Ford Sales, Inc., appeared by attorney. Defendant, Ford Motor Credit Company, appeared in person and by attorney.

After presentation of the testimony, evidence and argument of counsel, the Court found that the Retail Installment Contract entered into between Plaintiffs and Defendants violated the Texas Consumer Credit Code in the following respects, to-wit:

1. By contractually allowing the Seller in paragraph 19 of the Retail Installment Contract to accelerate the maturity of the contract under conditions expressly prohibited in that same may be accelerated if the Buyer fails to comply with any provisions of the contract, all contrary to Section 7.07(1) of the Texas Consumer Credit Code.

2. By contractually allowing the Seller, pursuant to the terms of paragraph 19 of the Retail Installment Contract to enter upon Buyer's premises unlawfully and to commit a breach of peace in effecting repossession of the property, contrary to Section 7.07(3) of the Texas Consumer Credit Code in the following respects:

(a) By giving the Seller the right to repossess the property wherever the same may be found with free right to entry.

(b) By giving the Seller the right to retain personalty in or attached to the property when repossessed.

3. By contractually providing in paragraph 19 of the Retail Installment Contract for a waiver of Buyer's rights of action against Seller or holder or any other person acting therefor for any illegal act committed in the repossession of the motor venicle, all contrary to Section 7.07(4) of the Texas Consumer Credit Code in the following respects:

(a) By giving the Seller the right to repossess the property wherever the same may be found with free right to entry.

(b) By giving the Seller the right to retain all payments made prior to repossession.

(c) By giving the Seller the right to retain personalty in or attached to the property when repossessed without liability to the Seller.

(d) By requiring the Buyer to waive his rights to personalty in or attached to the property when repossessed.

(e) By requiring the Buyer to agree to pay "other expenses" incurred by the Seller in effecting collection, repossession or resale of the property.

4. By contractually providing in paragraph 20 of the Retail Installment Contract that any illegal aspect of the Contract is ineffective and thus requires Buyer to agree not to assert against the Seller any claims or defenses arising out of the sale of the property, contrary to Section 7.07(6) of the Texas Consumer Credit Code.

5. By contractually allowing the Seller pursuant to paragraph 19 of the Retail Installment Contract, to accelerate upon default "all amounts due or to become due hereunder to be immediately due and payable" without the allowance or deduction of unearned finance charges as required under Section 7.04 of the Texas Consumer Credit Code.

6. By contracting, pursuant to paragraph 19 of the Retail Installment Contract, for interest and time price differential which is in the aggregate in excess of double the total amount of charges authorized by Section 7.03 of the Texas Consumer Credit Code in that Seller is authorized to declare "all amounts due or to become due hereunder to be immediately due and payable".

7. By not containing the names and addresses of both Buyers as required by Section 7.02(5) of the Texas Consumer Credit Code.

8. By not stating the principal balance as required by Section 7.02(6)(f) of the Texas Consumer Credit Code.

Based on such findings and considering the Partial Motion for Summary Judgment heretofore granted in this cause, and additional evidence, plus the stipulations of the parties, the Court is of the opinion that said Partial Motion for Summary Judgment be made final and that Judgment should be rendered in favor of Plaintiffs and against Defendants, Tradewinds Ford Sales, Inc. and Ford Motor Credit Company, jointly and severally.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiffs, Don B. Caskey and Ralph E. Caksey, recover jointly and severally from Defendants, Tradewinds Ford Sales, Inc. and Ford Motor Credit Company, the following:

A. Twice the amount of interest or time price differential and default and deferment charges contracted for, charges or received, that sum being $3,667.80

B. The forfeiture of all principal as well as all interest or time price differential and all other charges, that sum being $9,004.68.

C. Reasonable attorney's fees in the amount of $2,500.00; that in the event Defendants appeal to the Court of Civil Appeals, Plaintiffs recover from Defendants reasonable attorney's fees in the amount of $1,500.00; that in the event the Court of Civil Appeals upholds the verdict in Plaintiffs' favor and Defendants apply for a Writ of Error to the Suprene Court of Texas, that Plaintiffs recover an additional $1,000.00 attorney's fees, all said attorney's fees on appeal with automatic remittitur in the event of no appeal or limited appeal.

D. All other relief which the Plaintiff sought and which is not

specifically herein granted is denied.

With regard to the Cross Action filed by Cross Plaintiff, Tradewinds Ford Sales, Inc. and Ford Motor Credit Company, the Court finds that Plaintiff and Cross Defendants, Don B. Caskey and Ralph E. Caskey, are in default under the terms and conditions of such Contract in that there have been no payments made under the provisions of the Contract made the basis of these proceedings, and that at the time of the hearing of this cause, the amount due and owing Cross Plaintiffs, Tradewinds Ford Sales, Inc. and Ford Motor Credit Company by the Plaintiffs and Cross Defendants is $8,329.66, plus attorney's fees as provided in the Contract; however, in view of the Court's finding that the Defendants and Cross Plaintiffs should forfeit all principal, as well as interest or time-price differential and all other charges, the Court believes that such finding necessitates that Defendants and Cross Plaintiffs take nothing by way of their Counter Claim and Cross Claims against Plaintiffs and Cross Defendants;

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that Cross Plaintiffs, Tradewinds Ford Sales, Inc. and Ford Motor Credit Company, take nothing by way of their Counter Claim and Cross Claims against Plaintiffs and Cross Defendants, Don B. Caskey and Ralph E. Caskey, and that all costs be assessed against Defendants and Cross Plaintiffs, Tradewinds Ford Sales, Inc. and Ford Motor Credit Company, jointly and severally.

SIGNED AND ORDERED ENTERED this 17th day of November, 1978.

JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

C. H. HENKEL, III

ATTORNEY FOR PLAINTIFFS AND CROSS DEFENDANTS,
DON B. CASKEY AND RALPH E. CASKEY

SORRELL, ANDERSON & SORRELL

BY: _____
J. R. SORRELL, JR.

ATTORNEYS FOR DEFENDANT AND CROSS PLAINTIFF,
TRADEWINDS FORD SALES, INC.

PORTER, TAYLOR, GONZALEZ, THOMPSON & ROGERS

BY: _____
RICK ROGERS

ATTORNEYS FOR DEFENDANT AND CROSS PLAINTIFF,
FORD MOTOR CREDIT COMPANY

APPENDIX E

FILED
IN SUPREME COURT
OF TEXAS
AUG 4 1981
MARION R. JACKSON, CLERK
BY _____ DEPUTY

NO. B-9617

IN THE

SUPREME COURT

OF TEXAS

DONALD B. CASKEY, ET AL.,

Petitioners

V.

FORD MOTOR CREDIT COMPANY
and TRADEWIND FORD SALES, INC.,

Respondents

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE SUPREME COURT OF THE STATE OF TEXAS:

Notice is hereby given that Ford Motor Credit Company and Tradewind Ford Sales, Inc., Respondents herein, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Texas reversing that portion of the judgment of the Court of Civil Appeals and affirming the judgment of the District Court of Travis County finding that Respondents were liable for a violation of Tex.Rev.Civ. Stat.Ann., Art 5069-7.07(4), for statutory penalties and for attorneys' fees. Said judgment was entered in this suit by this Court on June 10, 1981, and Respondents' timely filed Motion for Rehearing was also overruled on that date.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Respectfully submitted,

BAKER & BOTTS

By Randall A. Hopkins

Randall A. Hopkins (TBA# 09977300)
Lee H. Gudel (TBA# 08565500)
3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

PORTER, GONZALES & ROGERS

By Rick F. Rogers, Jr.
Rick F. Rogers, Jr.
1800 Guaranty Bank Plaza
Corpus Christi, Texas 78475

Attorneys for Respondents
Ford Motor Credit Company
and Yates Ford, Inc.

CERTIFICATE OF SERVICE

I certify that on this 31 day of August, 1981, I deposited in the United States mail, postage prepaid, certified, return receipt requested, a true and correct copy of the above and foregoing Notice of Appeal To the Supreme Court of the United States, properly addressed to:

Mr. C.M. Henkel
520 Guaranty Bank Plaza
Corpus Christi, Texas 78475

Honorable Mark White
Attorney General
Supreme Court Building
Austin, Texas 78711

Randall A. Hopkins
Randall A. Hopkins

RAH:30:V

CHAPTER 7

MOTOR VEHICLE INSTALLMENT SALES

Art.

5069—7.01. Definitions.
5069—7.02. Requirements and prohibitions as to retail installment contracts.
5069—7.03. Finance charge limitations.
5069—7.04. Refunds on prepayment.
5069—7.05. Amendments of retail installment contracts.
5069—7.06. Insurance.
5069—7.07. Prohibited provisions.
5069—7.08. Assignment and negotiation
5069—7.09. Application.
5069—7.10. Waiver.

Chapter 7, Motor Vehicle Installment Sales, consisting of articles 5069—7.01 to 5069—7.10, was enacted by Acts 1967, 60th Leg., p. 609, ch. 274, § 2, effective January 1, 1968. Provisions relating to cash and time prices in sales of motor vehicles were formerly covered by repealed article 5074a.

Art. 5069—7.01. Definitions

For the purposes of this Chapter, unless the context otherwise requires:

(a) "Motor Vehicle" means and is limited to any automobile, mobile home, truck, truck tractor, trailer, semi-trailer and bus designed and used primarily to transport persons or property on a public highway, excepting however, any boat trailer, any vehicle propelled or drawn exclusively by muscular power or which is designed to run only on rails or tracks or in the air, or other machinery not designed primarily for highway transportation, but which may incidentally transport persons or property on a public highway.

(b) "Retail Buyer" or "Buyer" means a person who agrees to buy or buys a motor vehicle other than principally for the purpose of resale, from a retail seller in a retail installment transaction.

(c) "Retail Seller" or "Seller" means a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions.

(d) "Retail Installment Transaction" or "Transaction" means any transaction as a result of which a retail buyer acquires a motor vehicle from a retail seller under a retail installment contract for a sum consisting of the cash sale price and other charges as limited by this Chapter and agrees with a retail seller to pay part or all of such sum in one or more deferred installments. The term shall include every transaction wherein the promise or agreement to pay the deferred balance of such sum is made by the retail buyer to the retail seller notwithstanding the existence or occurrence of any one or more of the following events: (i) that the retail seller has arranged or arranges to sell, transfer or assign the retail buyer's obligation; (ii) that the amount of the charges is determined by reference to charts or information furnished by a financing institution; (iii) that the forms of instruments used to evidence the retail installment transaction are furnished by a financing institution; and (iv) that the credit standing of the retail buyer is or has been evaluated by a financing institution.

(e) "Retail Installment Contract" or "Contract" means a contract entered into in this State evidencing a retail installment transaction. The term includes a chattel mortgage, conditional sale contract, security agreement and a contract in the form of a bailment or a lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the value of the motor vehicle sold and it is agreed that the bailee or lessee is bound to become, or, for no further or a merely nominal consideration, has the option of becoming, the owner of the motor vehicle upon full compliance with the provisions of the bailment or lease. The term shall also include a contract which the parties have amended in order to renew, restate or reschedule the unpaid balance thereof, or to extend or defer the scheduled due date of all or any part of any installment or installments, in which case the retail installment contract shall consist of the original contract and the amendments thereto.

(f) "Cash Sale Price" means the price stated in a retail installment contract for which the seller would have sold to the buyer and the buyer would have bought from the seller, the motor vehicle which is the subject matter of such contract if such sale had been a sale for cash. The cash sale price may include any taxes, registration, certificate of title and license fees, and charges for delivering, servicing, repairing, altering or improving the motor vehicle.

(g) "Official Fees" means the amount of the fees prescribed by law for filing, recording or otherwise perfecting and, in addition, for releasing or satisfying a retained title, lien or other security interest created in connection with a retail installment transaction.

(h) "Principal Balance" means the cash sale price of the motor vehicle plus the amounts, if any, included in the retail installment con-

tract, if a separate identified charge is stated therein, for insurance and other benefits and official fees, less the amount of the buyer's down payment, if any, in money or goods or both.

(i) "Time Price Differential" means the total amount to be added to the principal balance to determine the balance of the buyer's indebtedness to be paid under a retail installment contract.

(j) "Holder" means the retail seller of the motor vehicle or assignee if the retail installment contract or the outstanding balance thereunder is sold or otherwise transferred.

(k) "Time Sale Price" means the total of the cash sale price of the motor vehicle and the amount, if any, included for insurance, if a separate identified charge is made therefor, and the official fees and the time price differential.

(*l*) "Person" means an individual, partnership, corporation, joint venture, trust, association, or any legal entity however organized.

(m) Words of the masculine gender include the feminine and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

Acts 1967, 60th Leg., p. 648, ch. 274, § 2, eff. Jan. 1, 1968.

Art. 5069—7.02. Requirements and prohibitions as to retail installment contracts

(1) Each retail installment contract shall be in writing, dated, signed by both the buyer and the seller, and completed as to all essential provisions before it is signed by the buyer; provided, however, if delivery of the motor vehicle is not made at the time of the execution of the contract, the identifying numbers or marks or similar information and the due date of the first installment may be inserted in the contract after its execution. A retail installment contract need not be contained in a single document.

(2) The printed portion of the retail installment contract, other than instructions for completion, shall be in a size equal to at least eight-

point type. Such contract shall contain substantially the following notice in a size equal to at least ten-point bold type:

"NOTICE TO THE BUYER—DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE CONTRACT YOU SIGN. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE TIME PRICE DIFFERENTIAL. KEEP THIS CONTRACT TO PROTECT YOUR LEGAL RIGHTS."

(3) A retail installment contract shall also contain, in a size equal to at least ten-point bold type, a specific statement that liability insurance coverage for bodily injury and property damage caused to others is not included, if that is the case.

(4) The seller shall deliver to the buyer, or mail to him at his address shown on the retail installment contract, a copy of such contract as accepted by the seller. Until the seller does so, a buyer who has not received delivery of the motor vehicle shall have the right to rescind his contract and to receive a refund of all payments made and a return of all goods traded in to the seller on account of or in contemplation of such contract, or if the goods traded in cannot be returned, the value thereof. Any acknowledgment by the buyer of delivery of a copy of the retail installment contract shall be in a size equal to at least ten-point bold type and shall appear directly above the buyer's signature.

(5) The retail installment contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or other address of the buyer as specified by the buyer, and a description of the motor vehicle sold or to be sold.

(6) The retail installment contract shall specifically set out the following items:

(a) The cash sale price of the motor vehicle;

(b) The amount of the buyer's down payment, if any, specifying the amounts paid in money and in goods traded in;

(c) The difference between items (a) and (b);

(d) The aggregate amount, if any, included for insurance if a separate identified charge is made therefor, specifying the type or types and the term of coverage;

(e) The aggregate amount of official fees, if a separate identified charge is made therefor;

(f) The principal balance, which is the sum of items (c), (d) and (e);

(g) The amount of the time price differential; and

(h) The sum of items (f) and (g), which is the balance to be paid by the buyer to the seller, the number of installments, the amount of each installment and the due date or period thereof. If installment payments other than the final payment are stated as a series of periodic payments equal in period and amount, the number of payments and the amount and due date of each payment need not be separately stated, and the amount of the scheduled final installment payment may be stated as the remaining unpaid balance. The due date of the first installment payment may be fixed by a calendar date or by reference to the date of the contract or to the time of delivery.

(i) If any installment (except the down payment) is more than double the average of all prior installments (except the down payment), the following legend printed in at least ten-point bold type or typewritten:

THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS

followed, if there be but one such larger installment, by:

AN INSTALLMENT OF $_____ WILL BE DUE ON _____,

or if there be more than one such larger installment, by:

LARGER INSTALLMENTS WILL BE DUE AS FOLLOWS: _____,

in such latter case, inserting the amount of every such larger installment and of its due date.

(j) The above items need not be stated in the sequence or order set forth; additional items may be included to explain the calculations involved in determining the balance to be paid by the buyer.

(7) The buyer's acknowledgment, conforming to the requirements of this Article, of delivery of a copy of the retail installment contract shall be conclusive proof of such delivery, that such contract when signed by the buyer did not contain any blank spaces except as herein provided, and of compliance with this Article in any action or proceeding by or against a holder of such contract without knowledge to the contrary when he purchases it.

(8) Upon written request of the buyer, the holder of a retail installment contract shall give or forward to the buyer a written statement of the dates and amounts of installment payments and the total amount unpaid under such contract. Such a statement shall be given the buyer once every six months without charge; if any additional statement is requested by the buyer, it shall be supplied by the holder at a charge not in excess of One Dollar for each additional statement. A

buyer shall be given a written receipt for any payment when made in cash.

Acts 1967, 60th Leg., p. 649, ch. 274, § 2, eff. Jan. 1, 1968.

Art. 5069—7.03. Finance charge limitations

(1) Notwithstanding the provisions of any other law, the time price differential in a retail installment contract payable in substantially equal successive monthly installments beginning one month after the date of the contract shall not exceed the larger of Twenty-five Dollars or an amount determined under the following schedule:

Class 1. Any new domestic motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and any new foreign motor vehicle—Seven Dollars and Fifty Cents per One Hundred Dollars per annum.

Class 2. Any new domestic motor vehicle not in Class 1 and any used domestic motor vehicle designated by the manufacturer by a year model of the same or not more than two years prior to the year in which the sale is made and any used foreign motor vehicle not more than two years old—Ten Dollars per One Hundred Dollars per annum.

Class 3. Any used motor vehicle not in Class 2 and, if a domestic motor vehicle, designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made, and, if a foreign motor vehicle, not more than four years old—Twelve Dollars and Fifty Cents per One Hundred Dollars per annum.

Class 4. Any used motor vehicle not in Class 2 or Class 3—Fifteen Dollars per One Hundred Dollars per year. Provided, however, if the principal balance is Three Hundred Dollars or less, the time price differential shall be Eighteen Dollars per One Hundred Dollars per annum.

(2) Such charge shall be computed on the principal balance as determined under Article 7.02 of this Chapter from the date of the contract until the maturity of the final installment, notwithstanding that the balance thereof is required to be paid in installments.

(3) For a period less or greater than twelve months or for amounts less or greater than One Hundred Dollars, the amount of the maximum

charge set forth in the foregoing schedule shall be decreased or increased proportionately. A fractional monthly period of fifteen days or more may be considered a full month.

(4) If a retail installment contract is payable other than in substantially equal successive monthly installments, as where payable in irregular or unequal installments either in amount or periods thereof, or in equal successive monthly installments followed by or interspersed with an irregular, unequal or larger installment or installments, or in other than monthly installments or if the first installment is not payable one month from the date of the contract, the charge may not exceed an amount which, having due regard for the schedule of installment payments, will provide the same effective return as if the contract were payable in substantially equal successive monthly installments beginning one month from the date of the contract.

(5) A buyer under a retail installment contract may, upon written consent of the holder, transfer his equity in the motor vehicle at any time to another person, but in that event the holder shall be entitled to a transfer of equity fee not exceeding Twenty-five Dollars.

(6) The holder of any retail installment contract may collect a delinquency charge on each installment in default for a period of more than ten days in an amount not to exceed five percent of each installment or Five Dollars, whichever is less, or, in lieu thereof, interest after maturity on each such installment not to exceed the highest lawful contract rate. Provided, that only one such delinquency charge may be collected on any installment regardless of the period during which it remains in default. In addition, such contracts may provide for the payment of an attorney's reasonable fee where it is referred for collection to an attorney not a salaried employee of the seller or holder of the contract, and for court costs and disbursements, and in the event of repossession, sequestration, or other action necessary to secure possession of a motor vehicle securing the payment of a retail installment contract, such contracts may provide for the charge and collection of actual and reasonable out-of-pocket expenses incurred in connection with such repossession or foreclosure, including costs of storing, reconditioning and reselling such motor vehicle, subject to the standards of good faith and commercial reasonableness set by the Uniform Commercial Code as adopted in Texas.

Acts 1967, 60th Leg., p. 651, ch. 274, § 2, eff. Jan. 1, 1968.

Art. 5069—7.04. Refunds on prepayment

Notwithstanding the provisions of any retail installment contract to the contrary, any buyer may prepay it in full at any time before maturity, and if he does so, shall receive the following refund credit thereon:

On a contract payable in substantially equal successive monthly installments commencing one month after the date of the contract, the amount of such refund credit shall represent at least as great a proportion of the finance charge, after first deducting therefrom an acquisition cost of Twenty-five Dollars, as (i) the sum of the monthly balances under the schedule of payments in the contract beginning as of the date after such prepayment which is the next succeeding monthly anniversary date of the due date of the first installment under the contract, or, if the prepayment is prior to the due date of the first installment under such contract, then as of the date after such prepayment, which is one month after the next succeeding monthly anniversary date of the date of such contract, bears to (ii) the sum of all the monthly balances under the schedule of payments in such contract. When the amount of refund credit is less than One Dollar no refund credit need be made. On contracts payable in other than substantially equal successive monthly installments commencing one month after the date of the contract, the refund shall be computed in a manner proportionate to the above-described method, having due regard to the amount of each installment, to the irregularity of each installment period and to the provisions of Sections (2) and (4) of Article 7.03 hereof.

Acts 1967, 60th Leg., p. 652, ch. 274, § 2, eff. Jan. 1, 1968.

Art. 5069—7.05. Amendments of retail installment contracts

(1) The holder of a retail installment contract upon request by the buyer, may agree to an amendment thereto to extend or defer the scheduled due date of all or any part of any installment or installments or to renew, restate or reschedule the unpaid balance of such

contract, and may collect for same a charge not to exceed an amount computed under either of the following:

(a) If all or any part of any installment or installments is deferred for not more than three months the holder may at his election charge and collect on the amount deferred for the period deferred a charge computed at a rate which will not exceed the same effective return as is permitted on monthly payment contracts under Article 7.03; provided that the minimum charge shall be One Dollar. Such amendment may also include payment by the buyer of the additional cost to the holder of premiums for continuing in force any insurance coverages provided for in the contract and any additional necessary official fees.

(b) In any other extension, renewal, restatement or rescheduling of the unpaid balance, the charge may be computed as follows: The sum of the unpaid balance as of the date of amendment and the cost of any insurance incidental to the amendment, any additional necessary official fees, and any accrued delinquency and collection charges, after deducting the prepayment refund credit required by Article 7.04, shall constitute a principal balance on which the charge may be computed for the term of the amended contract at the applicable time price differential provided in Article 7.03 after reclassifying the motor vehicle by its year model at the time of the amendment. The provisions of this Chapter relating to minimum charges under Article 7.03 and acquisition costs under the refund schedule in Article 7.04 shall not apply in calculating the principal balance of the amended contract. The amendment to the contract must be confirmed in a writing signed by the buyer. The writing shall set forth the terms of the amendment and the new due dates and amounts of the installments; a copy thereof shall either be delivered to the buyer or mailed to him at his address as shown on the contract. Said writing together with the original contract and any previous amendments thereto shall constitute the retail installment contract.

Acts 1967, 60th Leg., p. 652, ch. 274, § 2, eff. Jan. 1, 1968.

Art. 5069—7.06. Insurance

(1) On any retail installment contract made under the authority of this Chapter, a seller or holder may request or require a buyer to provide credit life insurance and credit health and accident insurance as additional protection for such contract, and include the cost of such insurance as a separate charge in such contract. Only one policy of life insurance and one policy of health and accident insurance on any one buyer may be in force with respect to any one loan contract at any one time.

(2) A seller or holder may, in addition, request or require a buyer to insure tangible personal property involved in such a contract, made under authority of this Chapter, and include the cost of such insurance as a separate charge in such contract. Such insurance and the premiums or charges therefrom shall bear a reasonable relationship to the amount, term and conditions of the contract, the existing hazards or risk of loss, damage or destruction, and shall not provide for unusual or exceptional risks or coverages which are not ordinarily included in policies issued to the general public.

(3) When insurance is required in connection with such a contract or agreement made under this Chapter, the seller or holder shall furnish the borrower a statement which shall clearly and conspicuously state that insurance is requested or required in connection with the contract, and that the buyer shall have the option of furnishing the required insurance either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverages through any insurance company authorized to transact business in Texas. In addition when any requested or required insurance is sold or procured by the seller or holder at a premium or rate of charge not fixed or approved by the State Board of Insurance, the seller or holder shall include such fact in the foregoing statement, and the buyer shall have the option for a period of five days from the date of the contract or agreement of furnishing the required insurance coverage either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverages through any insurance company authorized to transact business in Texas. Such statement or statements may be made in conjunction with or as part of the retail installment contract required by Article 7.02.

(4) Such insurance shall be written at lawful rates and in accordance with the provisions of the Texas Insurance Code by a company authorized to do business in this State.

(5) The contract or agreement must state the kind, coverage, term and amount of premium for such insurance.

(6) If dual interest insurance on the motor vehicle is purchased by the seller or seller's assignee, as the case may be, it shall within thirty days after execution of the retail installment contract, send or cause to be sent to the buyer a policy, or policies, or certificates of insurance written by an insurance company authorized to do business in this State, clearly setting forth the amount of the premium, the kind or kinds of insurance, the coverage and all the terms, options, limitations, restrictions and conditions of the policy or policies of insurance. The buyer shall have the privilege at the time of execution of the contract

of purchasing such insurance from an agent or broker of his own selection and of selecting an insurance company acceptable to the holder, but in such case the inclusion of the insurance premium in the retail installment contract shall be optional with the seller.

(7) If the insurance is cancelled, adjusted or terminated for any reason, the refund for unearned insurance premiums received by the seller or the holder shall be credited to the final maturing installments of the retail installment contract, and the remaining balance of the unearned insurance premiums shall be refunded to the buyer; provided, however, that no cash refund shall be required if the amount thereof is less than One Dollar.

(8) The retail installment contract shall clearly and conspicuously disclose whether or not bodily injury and property damage liability insurance is provided pursuant thereto.

(9) Any gain, advantage to the seller or holder, or any employee, officer, director, agent, general agent, affiliate or associate from such insurance or its provision or sale shall not be considered as an additional charge or further time price differential in connection with any retail installment contract made under this Chapter except as specifically provided herein.

Acts 1967, 60th Leg., p. 653, ch. 274, § 2, eff. Jan. 1, 1968.

Art. 5069—7.07. Prohibited provisions

No retail installment contract or retail charge agreement shall:

(1) Provide that the seller or holder may accelerate the maturity of any part or all of the amount owing thereunder unless (a) the buyer is in default on the performance of any of his obligations or (b) the seller or holder in good faith believes that the prospect of payment or performance is impaired;

(2) Contain a power of attorney to confess judgment in this State or an assignment of wages;

(3) Authorize the seller or holder or other person acting on his behalf to enter upon the buyer's premises unlawfully or to commit any breach of the peace in the repossession of a motor vehicle;

(4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle;

(5) Contain any provision by which the buyer executes a power of attorney appointing the seller or holder or other person acting on his behalf, as the buyer's agent in the repossession of a motor vehicle;

(6) Provide that the buyer agrees not to assert against the seller or holder of any claim or defense arising out of the sale.

Acts 1967, 60th Leg., p. 654, ch. 274, § 2, eff. Jan. 1, 1968.

Art. 5069—7.08. Assignment and negotiation

(1) Any person may purchase or acquire or agree to purchase or acquire any retail installment contract or any outstanding balance from any other person on such terms and conditions and for such price as may be mutually agreed upon;

(2) Notice to the buyer of the assignment or negotiation and any requirement that the seller be deprived of dominion over payments upon a retail installment contract, or over the motor vehicle if returned to or repossessed by the seller, is not necessary to the validity of a written assignment or negotiation of the retail installment contract or any outstanding balance as against creditors, subsequent purchasers, pledgees, mortgagees and lien claimants of the seller;

(3) Unless the buyer has notice of the assignment or negotiation of his retail installment contract, or any outstanding balance thereunder payment therefor made by the buyer to the holder last known to him shall be binding upon all subsequent holders;

(4) No right of action or defense of a buyer arising out of a retail installment sale which would be cut off by negotiation, shall be cut off by negotiation of the contract to any third party unless such holder acquires the contract in good faith and for value and gives notice of the negotiation to the buyer as provided in this Article, and within thirty days of the mailing of such notice receives no written notice of any facts giving rise to any claim or defense of the buyer. A notice of negotiation shall be in writing addressed to the buyer at the address shown on the contract and shall identify the contract, state the names of the seller and buyer; describe the motor vehicle; state the time balance and the number and amounts of the installments. The notice of negotiation shall contain the following warning to the buyer in ten-point bold face type:

> IF YOU HAVE ANY COMPLAINT OR OBJECTION REGARDING THE GOODS OR SERVICES COVERED BY THE CONTRACT IDENTIFIED IN THIS NOTICE, OR ANY CLAIM OR DEFENSE RELATING TO SUCH CONTRACT, YOU MUST NOTIFY US WITHIN 30 DAYS FROM THE DATE THIS NOTICE WAS MAILED.

Acts 1967, 60th Leg., p. 655, ch. 274, § 2, eff. Jan. 1, 1968.

Art. 5069—7.09. Application

None of the provisions of this Chapter shall affect or apply to any loans or to the business of making loans under or in accordance with the laws of this State, nor shall any of the provisions of the loan or interest statutes of this State affect or apply to any retail installment transaction. Nor shall any seller pay, promise to pay, or otherwise tender cash to any buyer as a part of any transaction made pursuant to this Chapter unless otherwise specifically authorized by this Chapter. Nothing in this Chapter shall be construed to impair or in any way affect any rule of law applicable to, or governing retail installment sales not otherwise subject hereto. This Chapter shall apply exclusively to all retail installment transactions as defined in Article 7.01.

Acts 1967, 60th Leg., p. 655, ch. 274, § 2, eff. Jan. 1, 1968.

Best Copy Available

APPENDIX G

ACCOUNT NO. **TEXAS AUTOMOBILE RETAIL INSTALMENT CONTRACT**

Buyer's Name and Address (Including County and Zip Code)
RALPH E. CASEY
909 DANIELE
CORPUS CHRISTI, TX 78411

Seller's Name and Address
Tradewinds Sales, Inc.
401 S. Water Street, P.O. Box 1580
Corpus Christi, Texas 78403

Buyer (which means the undersigned Buyers and Co-buyers, jointly and severally) hereby buys and Seller hereby sells the following described motor vehicle, subject to the terms and conditions set forth on the face and reverse sides hereof, the Cash Sale Price of which is the amount set opposite the word "Cash" in Item 1 below. Buyer hereby acknowledges receipt of a true and complete copy of this contract before Buyer signed it.

New or Used	Year and Make	Series	Body Style	No. Cyl.	Gross Vehicle Weight Rating	Manufacturer's Serial Number	Use For Which Purchased
USED	1978 FORD	T BIRD	2 DR.	8		8J87H1C83366	☐ Personal ☐ Agricultural

DESCRIPTION OF TRADE-IN

1971 FORD (Year and Make) $ 960.67 (Gross Allowance)

$ None (Amount Owing)

OPTIONAL INSURANCE

Buyer authorizes Seller to obtain the following insurance coverages.

(a) Physical Damage Insurance: Coverage checked below for a term of _____ months (or for such shorter term as the lender to whom Seller assigns this contract may require) will provide for the amount included herein from the date hereof, covering accidental physical damage to the Property, based on actual cash value at the time of loss but not to exceed policy limits payable to Buyer or Seller as interest may appear:

☐ $ _____ Deductible Comprehensive ☐ Fire, Theft & Combined Additional Coverage } $ None (a)

☐ $ _____ Deductible Collision ☐ Towing & Labor Costs ($50.00 Limit) }

Physical Damage Insurance is required for this contract. If provided by Buyer pursuant to this contract, such insurance shall be payable to Buyer and Seller as their interests may appear and shall provide coverage for the actual cash value of the Property at time of loss (a) for collision (1) less deductible unless a higher deductible amount is approved by Seller and (b) for fire, theft and comprehensive or any combination coverage for the term of the contract, but, if the term of insurance for a lesser term will be acceptable provided the same is kept in force for the full term hereof. Except as to the person through whom such insurance is to be obtained, and Buyer shall have the option of furnishing the required insurance through existing policies of insurance owned or controlled by him or obtained by him through any insurance company authorized to transact business in Texas.

☐ If checked, the premium for such insurance included herein is at a rate of charge not fixed or approved by the State Board of Insurance of Texas.

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED.

(b) Credit Life Insurance on the life of [redacted] (Insured Person) for the term of this Contract

☐ Provided under Ford Life Insurance Company's Group Policy No. 2280 in accordance with the "Credit Life Insurance Eligibility" section below. Insured Buyer's Age _____ } $ _____ (b)

☒ Provided by Service Life in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date. } $ 156.63 (b)

(c) Credit Accident and Health or Disability Insurance provided by Service Life & Casualty for the term of this Contract in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date. $ 316.96 (c)

(d) Other Optional Insurance _____ (Specify) $ None (d)

Total Cost of Optional Insurance $ 473.64

NOTICE TO BUYER: You are not required to obtain the Credit Life and/or Credit Accident and Health or Disability Insurance for which a charge is indicated above and such is not a factor in the Seller's approval of this credit. ACKNOWLEDGING IT, BUYER requests and authorizes SELLER to obtain each insurance for which a charge is indicated above.

Buyer Ralph E Casey Date 12/6/78

(Refer to insurance by number)

CREDIT LIFE INSURANCE ELIGIBILITY

Credit Life Insurance under Ford Life Insurance Company's Group Policy No. 2280 is available only on the life of one natural person who is obligated to make payments under this retail instalment instrument and who is under the age of 65 on the date hereof. Benefits will be limited to a refund of payments of more than one person eligible for such insurance, or if death results from suicide within one year from the date hereof. For details see Notice of Proposed Group Credit Life Insurance on reverse side of Buyer's Copy.

The Insured Person (as defined in such Notice), in order to induce Ford Life Insurance Company to effect such insurance, hereby declares that to the best of his knowledge and belief he now is in good health and he hereby authorizes every physician or hospital, at the time of his death within one year from the date hereof, to disclose to Ford Life Insurance Company all information concerning his medical history prior to the date hereof.

The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.

Seller Tradewinds Ford Sales, Inc.

By R E Mills Smith Title Bus. Mgr.

DETAILS OF TRANSACTION

(INCLUDING DISCLOSURES REQUIRED BY FEDERAL LAW)

(1) Cash Price*		800.00	$ 8,321.00 (1)
Cash Down Payment	$	960.67	
Trade-In (See Opposite)	$		$ 1,760.67 (2)
(2) Total Down Payment			
(3) Unpaid Balance of Cash Price (Difference between Item 1 & 2)			$ 6,560.33 (3)
(4) Other Charges			
Optional Insurance		473.64	
(See Opposite)	$	None	
Official Fees	$		
Taxes (Not included on Cert. Value)	$	293.31	
License, Title & Registration Fees	$	23.50	
Total Other Charges			$ 790.45 (4)
(5) Unpaid Balance — Amount Financed* (Item 3 plus Item 4)			$ 7,350.78 (5)
(6) FINANCE CHARGE*			$ 1,653.93 (6)
(7) ANNUAL PERCENTAGE RATE			13.69 % (7)
(8) Total of Payments (Item 5 & 6)			$ 9,004.68 (8)
(9) Payment Schedule: Buyer hereby agrees to pay to Seller the Total of Payments (Item 8 above) in _____ monthly			None
_____ each and one final payment of $ 11-06 77			
one day of each month commencing _____ 19__.			
A late date is specified, one month after the date of this contract.			

(10) Balloon Payment(s): This Contract is not payable in installments of Equal Amounts.

☐ An installment of $ N/A on the date(s) on N/A

☐ Larger installments will be due as follows:

$ N/A on N/A; $ N/A on N/A

(Insert amount of each payment that is more than twice the amount of any other regularly scheduled equal payment. Such payments may be refinanced only upon such terms and conditions as the three parties to this contract may agree to at the due date.)

(11) Deferred Payment Price* (Sum of Items 1 & 2) $ 10,765.35

(12) Delinquency Charge. Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of $10.00, whichever is less, plus court costs and reasonable attorney's fees if this contract is placed with an attorney at law for collection by him.

(13) Security Interest. Seller hereby retains a security interest in the Motor Vehicle described above and in all parts, accessories, repairs and replacements thereof and additions thereto, to secure the payment in full of the Total of Payments and other amounts due or to become due hereunder.

(14) Prepayment Rebate. Buyer may prepay this contract in full at any time prior to maturity of the final instalment hereof, and if at the time of such prepayment the Buyer is not in default hereunder, Buyer shall be entitled to a rebate of the unearned portion of the Finance Charge computed by the actuarial method after first deducting an acquisition fee of $ _____ No rebate shall be made if the amount thereof is less than $1.00.

(15) Additional Terms and Conditions. The additional terms and conditions set forth on the reverse side hereof are a part of this contract as if incorporated herein, if checked.

NOTICE TO THE BUYER - DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE CONTRACT YOU SIGN. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE SERVICE PRICE DIFFERENTIAL. KEEP THIS CONTRACT TO PROTECT YOUR LEGAL RIGHTS.

Buyer acknowledges receipt of a true and completely filled-in copy of this contract at the time of signing.

Buyer Ralph E Casey

Co-Buyer Donna Casey

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

* INCONSISTENT STATE DISCLOSURES

The items of disclosure set forth above in the Federal Transaction are made in connection with the Federal Truth-in-Lending Act. The following items are made by the Texas Motor Vehicle Installment Sales Act either only with respect to the foregoing and are disclosed at the item numbers indicated: Cash Sale Price at Item (1); Financed Balance at Item (5); Time Price Differential at Item (6); and Time Sale Price at Item (11).

FMCC 11742 May 78

BUYER'S COPY

ADDITIONAL TERMS AND CONDITIONS

16. ASSIGNMENT
The original Seller may assign this contract and his assignee shall acquire all of his interest in this contract and the Property and shall be entitled to all the rights and privileges of Seller hereunder. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder and the original Seller shall not be the agent of the holder for transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property.

17. USE OF PROPERTY – WARRANTIES
Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller to release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller.

18. RISK OF LOSS – INSURANCE
The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverage on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverage for the term indicated for the amount included herein, Seller may (i) obtain such coverage for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing instalments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to his rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insurance by whomever obtained, including returned or unearned premiums. Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, may be applied toward replacement of the Property or payment of indebtedness hereunder on the sole discretion of Seller.

19. DEFAULT
Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or Seller in good faith believes that the prospect of payment or performance hereunder is impaired, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Upon request, Buyer shall deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency. Any personality in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay reasonable attorneys' fees (15% if permitted by law) and other expenses incurred by Seller in effecting collection, repossession or resale hereunder. Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

20. GENERAL
No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state in which the original Seller is located as shown on the face of this contract.

GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guarantees the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with reasonable attorneys' fees (15% of the amount then due, or if prohibited, the amount permitted by law) if placed in the hands of an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payments thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notices of non-payment and dishonor, and any other demands and notices required by law.

Guarantor _____ Address _____

Guarantor _____ Address _____

FORD LIFE INSURANCE COMPANY
NOTICE OF PROPOSED GROUP CREDIT LIFE INSURANCE

Notice hereby is given that if a charge for group credit life insurance is provided by Ford Life Insurance Company, Dearborn, Michigan, under its Group Policy No. 2200 is separately stated as a part of the balance payable under the annexed retail instalment instrument, and if such instrument is assigned or otherwise transferred to Ford Motor Credit Company, the group policyholder, and if the person to be insured is eligible for such insurance as determined, and if the person to be insured has provided a statement that to the best of his knowledge and belief he now is in good health, life insurance protection under the said Group Policy will be provided upon the life of such person with respect to such instrument. Any natural person is eligible for such insurance if he is primarily or secondarily obligated to make the payments provided in such instrument and has not attained his 65th birthday on or before the effective date of such instrument. The insured shall, in such instrument if such notice is absence of default in any payment coming due thereunder, remain in force, subject to the terms of the Group Policy, until discharge of all obligations thereunder. Any amount becoming payable at the death of the Insured Person will be applied to reduce or extinguish Buyer's obligation thereunder. The amount of insurance will be the amount owing from time to time under such instrument but not to exceed $10,000 less the amount of existing insurance on the date of such instrument with respect to any other obligation for which the Buyer is insured under the said Group Policy; provided that the amount payable under the said Group Policy will be limited to a credit or refund of the amount included as the premium or cost of such insurance in such instrument in the event that death of the Insured Person results from suicide, while sane or insane, within one year from the effective date of the insurance. If the insurance becomes effective, a certificate of insurance describing the coverage afforded in greater detail will be furnished to the Buyer within

THE ABOVE NOTICE APPLIES ONLY IF A CHARGE FOR CREDIT LIFE INSURANCE UNDER FORD LIFE INSURANCE COMPANY'S GROUP POLICY NO. 2200 HAS BEEN STATED IN THE ANNEXED INSTRUMENT. IF A CHARGE FOR OTHER CREDIT LIFE INSURANCE OR OTHER INSURANCE IS BEING INCLUDED THEREIN, BUYER WILL BE FURNISHED WITH SUCH APPLICATION, NOTICE, CERTIFICATE OR POLICY WITH RESPECT THERETO AS IS REQUIRED BY LAW.

Best Copy Available

APPENDIX H

NO. 77-4531-F

DON B. CASKEY and RALPH E. CASKEY		IN THE DISTRICT COURT
V.		OF NUECES COUNTY, TEXAS
TRADEWINDS FORD SALES, INC., FORD MOTOR COMPANY and FORD MOTOR CREDIT COMPANY		214TH JUDICIAL DISTRICT

AFFIDAVIT OF JIM HOFBAUER

THE STATE OF TEXAS |

COUNTY OF NUECES |

BEFORE ME, the undersigned authority, on this day personally appeared JIM HOFBAUER, known to me to be the person whose name is subscribed below, and who, after being duly sworn, stated on Oath as follows:

My name is Jim Hofbauer, and I am Assistant Branch Manager of Ford Motor Credit Company located at 4455 S. Padre Island Dr., Corpus Christi, Nueces County, Texas. I am over twenty-one (21) years of age, of sound mind, have never been convicted of a felony or any crime or offense involving moral turpitude, have personal knowledge of every statement made in this Affidavit, and am fully competent to testify in all respects. Each and every statement contained herein is correct.

I am Assistant Branch Manager of the local office of Ford Motor Credit Company, and in such capacity I have custody and control of all the files of Ford Motor Credit Company which are maintained by the Corpus Christi Branch office. I have heretofore on April 6, 1978 executed an Affidavit which has been filed in this cause. I adopt herein all statements made in such Affidavit and reconfirm that such statements are true and correct. In addition to such statements, I would additionally state under Oath that it is the established practice and procedure of Ford Motor Credit Company that when a customer prepays his obligations under a Contract prior to maturity, such customer receives a rebate of the unearned portion of the finance charge under the sum of the digits method, such rebate procedure more commonly known as the Rule of 78's. It has always been the policy of Ford Motor Credit Company in calculating any net payoff prior to the contracted for maturity date to rebate, or refund, the unearned finance charge regardless of whether such rebate results from a voluntary prepayment on the part of the customer, or an involuntary prepayment which results from an acceleration of maturity or repossession of the secured vehicle.

It is further the policy of Ford Motor Credit Company concerning personal property which is found in the vehicles which have been repossessed to make all efforts to return personal property found in repossessed vehicles as soon as possible. Following a repossession, the customer is requested to empty the vehicle of all personal belongings. If after a reasonable time, usually ninety (90) days, the customer fails to contact the Branch and all reasonable efforts to contact the customer, including co-buyers or immediate relatives, have failed, consideration may be given to disposing of the property through a local charity such as Goodwill Industries, Salvation Army, or some other nationally recognized charity. It is not until all reasonable efforts have been made by the Branch to return the personal property that such property is ultimately disposed of.

EXECUTED this 17th day of August, 1978.

Jim Hofbauer

JIM HOFBAUER

SWORN AND SUBSCRIBED TO BEFORE ME, the undersigned authority, this 17 day of August, 1978.

(SEAL)

NOTARY PUBLIC in and for
Nueces County, Texas

ENDORSED: FILED AUG 21 1978 OSCAR SOLIZ, CLERK DISTRICT COURT, NUECES COUNTY, TEXAS BY PAULINE QUINN DEPUTY
VOL 8/15

APPENDIX I

Subsidiaries of Ford Motor Company.

DOMESTIC AFFILIATES

Ford Credit — Canada Limited
Ford Motor Credit Company International
The American Road Insurance Company
Ford Life Insurance Company
Vista Insurance Company
Vista Life Insurance Company
American Road Services Company
American Road Equity Corporation
Ford Consumer Credit Company
Ford Motor Credit Company of Iowa
Ford Consumer Discount Company
Philco Finance Corporation
Canadian Road Credit Company, Limited
Ford Credit Equity Corporation
Ford Motor Company (Delaware)
Eveleth Taconite Company (Delaware)
Ford Products Company (Delaware)
Ford Communications, Inc. (Delaware)
Environ Inc. (Delaware)
Ohio Production Corporation (Delaware)
Predelivery Service Corporation (Delaware)
Ford Export Corporation (Delaware)
Ford Motor Land Development Corporation (Delaware)
Detroit Downtown Development Corporation (Delaware)
Ford Motor Properties, Inc. (Delaware)
Greenfield Properties, Inc. (Delaware)
Ghia, Inc. (Delaware)
Rise Services Incorporated (Delaware)
Dearborn Capital Corporation (Delaware)
Ford Leasing Development Company (Delaware)
Manhattan Ford, Lincoln-Mercury, Inc. (Delaware)

Ford Motor Dealership Facilities Company (Delaware)
Parklane Insurance Company (Michigan)
Ford Aerospace and Communications Corporation (Delaware)
Logistic Services Corporation (Delaware)
Aeronutronic Overseas Services, Inc. (Delaware)
Aeronutronic Services Corporation (Delaware)

FOREIGN AFFILIATES

Compania Financiera de Inversiones Y Credito S.A. (Argentina)
Ford Credit Australia, Limited
Ford Credit Australia Wholesale, Limited
Ford Credit N.V. (Belgium)
Ford Financiadora S.A. (Brazil)
Ford Distribuidora Ltd. (Brazil)
Ford Credit A.S. (Denmark)
Credit Ford S.A. (France)
Ford Credit Bank AG (Germany)
Henry Ford & Son (Finance) Limited (Ireland)
Ford Credit S.p.A. (Italy)
Ford Finance Company of Japan, Limited (Japan)
Ford Credit B.V. (Netherlands)
Ford Motor Credit Company of New Zealand, Ltd.
FCP Finance Corporation (Philippines)
FCP Credit Corporation (Philippines)
Ford Credit South Africa (Proprietary) Limited
Ford Credit S.A. (Spain)
For Leasing S.A. (Spain)
Ford Credit A.B. (Sweden)
Ford Credit S.A. (Switzerland)
Ford Motor Credit Company, Limited (United Kingdom)
Automotive Finance Limited (United Kingdom)
Ford Financial Trust Limited (U.K.)
Ford Motor Compania Comercial, S.A. de C.V. (Mexico)

Ford International Capital Corporation (Delaware)
Ford International Finance Corporation (Delaware)
Transcon Insurance Limited (Bermuda)
Ford Motor Company Caribbean, Inc. (Puerto Rico)
Fordson Coal Company (Delaware)
Ghia, S.p.A. (Italy)
Ford Latin America, S.A. de C.V. (Mexico)
Philco Corporation of Canada, Limited
Philco Radio E Televisao, Ltda (Brazil)
Philco Da Amazonia, Ltda (Brazil)
Philco Industria Brasileira de Semiconductores, Ltda. (Brazil)
Philco Gmbil (West Germany)
Dearborn Capital Corporation (Delaware)
Ford Motor Company of Canada, Limited
Ford Motor Company of Australia Limited
Ford Sales Company of Australia Limited
Ford Motor Company of New Zealand Limited
Ford Motor Company Private, Limited (Singapore)
Ford Motor Company of South Africa (Proprietary) Limited (South Africa)
Ensite Limited (Canada)
Essex Manufacturing (a Partnership) (Canada)
Mariveles Stamping Plant Branch (Philippines)
Ford Lio Ho Motor Company, Ltd. (Taiwan)
Ford Asia-Pacific, Inc. (Delaware)
Ford Philippines, Inc. (Philippines)
Ford Motor Company (Japan) Ltd. (Japan)
Ford Motor Company of Malaysia, Sdn. Bhd. (Malaysia)
Japan Automatic Transmission Company, Ltd. (Japan)
Ford Motor Argentina S.A. (Argentina)
Metalurgica Constitucion S.A. (Argentina)
Transax, S.A. Commercial Industrial Y Financiera (Argentina)

Plan Ovalo S.A. (Argentina)
Ford Motor Company S.A. (Mexico)
Ford Motor Company del Peru, S.A. (Peru)
Ford Motor Company del Venezuela (Venezuela)
Productos Industrailes, C.A. (Venezuela)
Ford Brasil, S.A. (Brazil)
Sao Francisco, Ltda Maquinas E Ferramentas (Brazil)
Bongotti S.A. Industria E. Comercio de Radiadores (Brazil)
Ford Administracao e Consorcios Ltda (Brazil)
Transglobal-Corretagem de Seguros, Ltda (Brazil)
Ford (Uruguay) S.A. (Uruguay)
Ford Mid-East and Africa, Incorporated (Delaware)
Ford Motor Company (Egypt) S.A.E., Alexandria (Egypt)
Ford Motor Company, Limited (England)
Ford Tractor (Belgium) Limited (Belgium)
Henry Ford & Son, Limited (Ireland)
Henry Ford and Son (Sales) Limited (Ireland)
Dagenham Motors Limited (England)
Ford Personal Import Export, Ltd. (England)
Ford-Werke AG (Germany)
Genk, Belgium Branch
Saar-Industrie, Gmbil (Germany)
Ford Verisicherungs Vermittlungs, Gmbil (Germany)
Ford Motor Company (Austria) K.G. (Austria)
Ford-Versorgungs-und-Unterstutzungseinrichtung-Gmbil (Germany)
Ford Investitions-Gmbil (Germany)
Ford Investitions-Gmbil & Co. oHG (Germany)
Ford Espana, S.A. (Spain)
Ford Leasing S.A. (Spain)
Ford of Europe Incorporated (Delaware)
Ford Motor Company (Belgium) N.V. (Belgium)
Ford Motor Company (Switzerland) S.A. (Switzerland)

Ford Motor Company A/S (Denmark
Ford Motor Norge A.S. (Norway)
Eik and Hausken A/S (Norway)
O/Y Ford A/B (Finland)
Ford France S.A. (France)
Ford Italiana S.p.A. (Italy)
Ford Lusitana S.A.R.I. (Portugal)
Ford Motor Company Aktiebolag (Sweden)
Ford Nederland N.V. (Netherlands)

Motion to Dismiss or Affirm

Office - Supreme Court, U.S.
FILED
NOV 4 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

No. 81-488

FORD MOTOR CREDIT COMPANY
AND
TRADEWINDS FORD SALES, INC.
Appellants,

v.

DON B. CASKEY, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

MOTION TO DISMISS OR AFFIRM

C. M. HENKEL III
520 Guaranty Bank Plaza
Corpus Christi, Texas 78475
512-884-8235
Attorney for Appellees

QUESTION PRESENTED

Whether the decision of the Supreme Court of Texas violated the due process requirements of the United State Constitution as announced in *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

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MOTION TO DISMISS OR AFFIRM

TO THE SUPREME COURT OF THE UNITED STATES:

Appellees moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Texas, on the grounds that it is manifest that the federal questions presented are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

This Appeal raises the question of the validity of a certain provision of the Texas Consumer Credit Code, specifically Tex. Rev. Civ. Stat. Ann., Article 5069-7.07 (4).

The statute provides that no retail installment contract shall include language which waives a purchaser's rights against the seller or holder of the contract for any illegal act committed by the seller or holder in the repossession of a motor vehicle.

On October 7, 1977, Don B. Caskey and Ralph E. Caskey, Appellees, purchased a 1977 Ford automobile from Tradewinds Ford Sales, Inc. The purchase of the vehicle was financed by Appellees' executing a Retail Installment Contract payable to Tradewinds Ford Sales, Inc. Subsequent thereto, Tradewinds assigned the Retail Installment Contract to Ford Motor Credit Company.

On December 12, 1977, Appellees filed suit against Tradewinds Ford Sales, Inc. and Ford Motor Company, for violations of the Texas Deceptive Trade Practice Act, Tex. Bus. and Comm. Code Ann., Section 17.41, et seq., alleging false, misleading and deceptive trade practices by Tradewinds and Ford Motor Company due to the fact that after being in possession of the vehicle for only two days, the rear-end "locked-up" causing the automobile to roll over[1]. Appellees also included in the suit allegations against Tradewinds Ford Sales, Inc. and Ford Motor Credit Company, Appellants herein, alleging numerous violations of the Texas Consumer Credit Code, Tex. Rev. Civ. Stat. Article 5069-7.01, et seq. Ap-

---

[1] That part of Appellee's claim for violation of the Texas Deceptive Trade Practice Act is not a part of this appeal.

pellees subsequently severed the Texas Deceptive Trade Practice Act allegations from the Texas Consumer Credit Code allegations and then moved for a partial summary judgment as to the Consumer Credit Code violations. The Trial Court granted a partial summary judgment for Appellees against Appellants, finding eight violations of the Texas Consumer Credit Code. Subsequent thereto, trial to the Court alone was held regarding the remaining issue of attorney's fees, additional violations of the Texas Consumer Credit Code, violations of the Federal Truth-in-Lending Act and violations of Federal Reserve Regulation Z. The Trial Court rendered judgment in favor of Appellees and against both Appellants for the statutory penalties under the Texas Consumer Credit Code plus attorney's fees, rejecting Appellees claim for Federal violations.

The Eastland Court of Civil Appeals reversed the judgment of the Trial Court, rendering a judgment in favor of Appellants. The Texas Supreme Court granted Appellees' Application for Writ of Error. Subsequent thereto the Supreme Court of Texas reversed the Eastland Court of Civil Appeals, finding that the Retail Installment Contract violated Article 5069-7.07(4) of the Texas Consumer Credit Code. Because only one violation of the Texas Consumer Credit Code is necessary to trigger the statutory penalties enacted by the Legislature, the Texas Supreme Court did not rule on the other point of error raised by Appellees on their Application for Writ of Error.

ARGUMENT

I. THE TEXAS CONSUMER CREDIT CODE CLEARLY SETS OUT PROHIBITED CONDUCT AND THUS THE DUE PROCESS REQUIREMENTS ARE MET.

Appellants contend that they are denied due process because the decision of Supreme Court of Texas expands the conduct prohibited by the Texas Consumer Credit Code. Article 5069-7.07 provides in part that no retail installment contract shall:

> "(4) provide for a waiver of buyer's rights of action against the Seller or Holder or other person acting therefore for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle;"

The language found to be in violation by the Texas Supreme Court was in paragraph 19 of the Retail Installment Contract which stated in part that

> ". . . any personality in or attached to the property when repossessed may be held by seller without liability and *buyer shall be deemed to have waived any claim thereto unless written demand* by certified mail is made upon seller within twenty-four (24) hours after repossession." (emphasis added)

Appellants argue that their repossession activities are regulated by the statute only during the actual taking of a vehicle and not during the entire repossession process. They further argue that to hold otherwise denies them the due process rights guaranteed by the United States Constitution. Appellees submit that the Texas

Legislature, in enacting the above referred to statute, to protect the citizens of the State of Texas from unscrupulous creditors, was concerned with abusive conduct that occured in "credit transactions" which commence upon the execution of the contract and terminate once the relationship between the buyer and seller is over. Accordingly, Appellees respectfully submit that Appellants did in fact have fair notice that the waiver provisions of the contract provided to Appellees violated Article 7.07(4) of the Texas Consumer Credit Code. In *Zapata vs. Ford Motor Credit Company*, 613 S.W. 2d 198 (Tex. 1981)[2], decided only one week prior to the case before this Court today, on exactly the same point, the Supreme Court of Texas, in finding a violation of the Texas Consumer Credit Code pointedly made reference to its earlier decision in *Southwestern Investment Company vs. Mannix*, 557 S.W. 2d 755 (Tex. 1977) where it held that almost identical language to Article 5069-7.07 (4) concerning goods (instead of a motor vehicle) meant that unconscionable contract provisions (waiving illegal acts) are unenforceable and result in statutory penalties under the Texas Consumer Credit Code. The Court, in *Zapata*, supra, further cited with approval a holding by the Fort Worth Texas Court of Civil Appeals in *Ford Motor Credit Company vs. Cole*, 503 S.W. 2d 853 (Tex. Civ. App.-Dallas 1973, writ ref'd n.r.e.) which discussed the exact clause before this Court today. In *Cole*, supra, the Court determined that if the clause exempted a secured party from liability for conversion, it would be unenforceable. Clearly Appellants had fair notice as early as 1973 that the waiver provisions of the contract before this Court today violated Article 5069-7.07(4) of the Code. Had Appellants chosen to pay attention to

[2] Opinion attached to Appellants' Judisdictional Statement as Appendix B.

the *Cole*, supra, opinion, they could easily determine that the clause was against the public policy of the State of Texas and thus unenforceable. However, Appellants chose to "thumb their nose" at the Fort Worth Court and now attempt to hide behind the due process clause of the United States Constitution. Since Appellants elected to ignore the dictates of *Mannix*, supra, and *Cole* supra, they should not be allowed to escape culpability on the ground they were not sufficiently appraised of what the statute prohibited.

Accordingly, while the statute on its face clearly prohibits activity involving the entire repossession process, including conversion within twenty-four hours after the actual taking of the motor vehicle, prior case law such as *Mannix*, supra, and *Cole*, supra, certainly give Appellants notice of the violation. Obviously, the Supreme Court of Texas in no way expanded the activity specifically prohibited by the Texas Consumer Credit Code.

II. THE DOCTRINE OF TRESPASS AB INITIO IS FOLLOWED IN TEXAS.

Appellants next assert that the doctrine of trespass ab initio is an archaic legal fiction no longer followed in Texas.

Appellees respectfully submit that the Supreme Court of Texas has never repudiated the above doctrine. Not only was the doctrine followed at the time of the enactment of the Texas Consumer Credit Code in 1967, but trespass ab initio has been consistently followed by Texas courts and again specifically approved in the *Zapata*, supra, decision. Not until *Simpson vs. Philip's Pipeline Company*, 603 S.W. 2d 307 (Tex. Civ. App.-Beaumont 1980, writ ref'd n.r.e.) was there a discus-

sion of reputation of the doctrine. The Texas Supreme Court's opinion in *Zapata*, supra, should again quell any thought of reputation of the doctrine.

Regardless of the Texas Supreme Court's reliance on the above doctrine, other Texas Courts have found the violation by Appellant in the instant case to exist without resorting to the doctrine of trespass ab initio. See *Ford Motor Credit Company vs. McDaniel*, 613 S.W. 2d 513 (Tex. Civ. App.-Corpus Christi 1981, writ ref'd n.r.e.); *Ford Motor Credit Company vs. Corley*, 613 S.W. 2d 519 (Tex. Civ. App.-Corpus Christi 1981, writ ref'd n.r.e.); *Ford Motor Credit Company vs. Brown*, 613 S.W. 2d 521 (Tex. Civ. App.-Corpus Christi, 1981, writ ref'd n.r.e.); *Gutierrez vs. McMorris Downtown Ford, Inc.*, A-77-CA-174 (W.D. Tex. 1980, appeal pending)[3]. The above cited cases all determined that the waiver provision in paragraph 19 cited above did not merely restate the law of bailment as alleged by Appellants herein. The Courts specifically found that such clause waived a buyer's claim to personalty when proper notice was not given, determining that such language was clearly not the law in a bailor-bailee arrangement. Incidently, the above Courts were also impressed by the *Cole*, supra, opinion rendered in 1973 addressing the unconscionable aspects of the clause as being contrary to the public policy of the State of Texas.

Accordingly, while it was unnecessary to apply the doctrine of trespass ab initio to the case at bar due to the clear violations of the Texas Consumer Credit Code, the Supreme Court of Texas properly applied the doctrine, simply re-establishing the long recognized and followed rule of law.

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[3] The opinion in Gutierrez vs. McMorris Downtown Ford, Inc. is attached hereto as Appendix A.

III. THE DECISION OF THE SUPREME COURT OF TEXAS IS NOT CONTRARY TO *BOUIE VS. CITY OF COLUMBIA*.

Relying upon *Bouie vs. City of Columbia*, 378 U.S. 347(1964), Appellants assert that the opinion of the Texas Supreme Court in the instant case is in direct conflict with the *Bouie* decision.

A careful reading of *Bouie* clearly indicates that Appellants contention is without merit.

Bouie concerned a criminal trespass statute prohibiting "entry upon lands of another . . . after notice from the owner or tenant prohibiting such entry." As a part of a "sit-in" demonstration, the Defendant entered a lunch counter. Prior to the entry, the Defendant did not receive notice not to enter the area. The conviction of the Defendant was upheld by the Supreme Court of South Carolina which interpreted the criminal trespass statute to include guilt once the Defendant was asked to leave the lunch counter and failed to do so. This Court properly determined that the Defendant was punished for conduct which was not criminal at the time it was committed and thus a violation of the due process clause arose. Obviously, once one has entered property, he cannot be told that the entry is prohibited and thus commit a crime after the fact. In the instant case, the statute prohibits activity in the repossession process. The contract, in paragraph 19, waives any claims the buyer has to personalty twenty-four hours after the actual taking of the vehicle. This clause clearly attempts to get the buyer to waive any claim he has for illegal acts committed by the seller or holder.

Appellants assertion that they could not reasonably foresee that the Supreme Court of Texas would interpret the clause in the contract to be in violation of the

Texas Consumer Credit Code is equally without merit. As early as 1973, in *Cole*, supra, Appellants were on notice that a Texas court had found the language in paragraph 19 to be contrary to the public policy of the State of Texas and thus enforceable. The issue before this Court today is simply whether or not Appellants had fair notice that the "twenty-four hour clause" in the contract before the Court was in violation of Article 5069-7.07(4). A literal reading of the statute as well as prior case law clearly creates the required notice.[4]

IV. APPELLANTS CAN LIMIT LIABILITY THROUGH USE CORRECTIONAL ERRORS.

Appellants finally argue that the Texas Supreme Court's decision in the case at bar threatens tens of thousands of other Retail Installment Contracts presently in existence in the State of Texas.

The Texas Legislature, in 1977, amended the Texas Consumer Credit Code to allow creditors to correct violations of the Code. Article 8.01(c)(1) allows any creditor to avoid liability if a correction notice is sent to the buyer within sixty days after discovering a violation. Appellants are well aware of the above statute. Indeed, in *Ford Motor Credit Company vs. Galbraith*, 619 S.W. 2d 2, Tex. Civ. App.-Houston 1981, no writ), Appellants attempted to effect a cure letter. In *Galbraith*, supra, the Houston Court of Civil Appeals found that the "cure letter", because of the way same was written, did not meet the requirements of the statute, specifically set-

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[4] See also the argument by Appellee in Cause No. 81-467; Ford Motor Credit Company and Yates Ford, Inc. vs. Zapata, U. S. Supreme Court, October Term, 1981, Appellee's brief, pages 14-20, regarding a narrow construction of Article 5069-7.07(4).

ting out guidelines as to how a creditor can meet the requirements of the statute. Accordingly, all Appellants need to do to eliminate any adverse consequences due to their violation of the Texas Consumer Credit Code is to send a letter to purchasers holding a contract containing the reprehensible language found to exist by the Supreme Court of Texas, and advise the purchasers of the violation, thus eliminating same. Appellees respectfully submit that had Appellants paid attention to the dictates of the Fort Worth Court of Civil Appeals in 1973 after the *Cole*, supra, opinion, and attempted to comply with the laws enacted by the Texas Legislature to protect the consumers in the State of Texas from unscrupulous lenders, that Appellant would not be faced with this suit forcing them to finally comply with the law.

CONCLUSION

For all the foregoing reasons, this appeal should either be dismissed or the decision of the Supreme Court of Texas be affirmed. Appellees further pray that reasonable attorney's fees and costs undertaken on their behalf as a result of this appeal be adjudged against Appellants.[5]

Respectfully submitted,

C. M. HENKEL III
Attorney for Appellees
520 Guaranty Bank Plaza
Corpus Christi, Texas 78475
512/884-8235

ORIGINAL SIGNED BY
C. M. HENKEL, III

C. M. HENKEL III

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Motion to Dismiss or Affirm has been sent by certified mail, return receipt requested, to the Appellants' attorneys of record, Randall Hopkins, 3000 One Shell Plaza, Houston, Texas 77002 and Rick Rogers, 1800 Guaranty Bank Plaza, Corpus Christi, Texas 78475, on this 2nd day of November, 1981.

ORIGINAL SIGNED BY
C. M. HENKEL, III

C. M. HENKEL III

[5] The judgment rendered below only awarded attorney's fees incurred for appeal through the Supreme Court of Texas.

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed
May 20, 1980
CHARLES W. VAGNER,
Clerk
By Deputy

JOSE GUTIERREZ and MANUELA GARCIA	†	
v.	†	Civil Action No.
McMORRIS DOWNTOWN FORD, INC. and FORD MOTOR CREDIT COMPANY	†	A-77-CA-174

MEMORANDUM OPINION AND ORDER

Came on this day for consideration by the Court defendant Ford Motor Company's motion for new trial or for alteration or amendment of judgment, and the Court is of the opinion that said motion should be granted in part and denied in part. It is accordingly ORDERED that the Memorandum Opinion and Order entered by this Court on April 3, 1980, be and hereby is, VACATED, and the following is substituted therefor:

Came on this day for consideration by the Court plaintiffs' motion for partial summary judgment, and the Court is of the opinion that said motion should be granted in part and denied in part. This is an action for statutory penalities and attorneys' fees under the federal Truth in Lending Act (15 U.S.C. §1601 *et seq.*), Regulation Z promulgated thereunder (12 C.F.R. §226)

and the Texas Consumer Credit Code (Article 5069, V. A.T.S.). Plaintiffs have settled their claims against defendant McMorris Ford, which has been dismissed from this case, and the motion now before the Court concerns only defendant Ford Motor Credit Company. Plaintiffs seek summary judgment as to the following issues:

1) Whether the credit agreements entered into by plaintiffs for the purchase of two vehicles violated the federal act and Regulation Z in the following respects:

a) by failing to itemize the charges for license, title and registration fees;

b) by failing to include the above charges in the finance charge, thereby resulting in a stated finance charge and annual percentage rate which was erroneous; and

c) Whether the credit agreements violated the state statute in the following respects:

a) by providing for a waiver of the buyers' rights of action against the seller or holder or any person acting therefor for any illegal act committeed in the repossession of the vehicles; and

b) by providing for an agreement that the buyers would not assert against the seller or holder any claim or defense arising out of the sale.

Involved herein are two credit agreements for the purchase of motor vehicles entered into by plaintiffs and defendant McMorris Ford and assigned to Ford Credit. One of these agreements was executed on October 4, 1976, and involved only plaintiff Gutierrez; the other agreement was executed on October 18, 1976, and was entered into by both plaintiffs. The agreements are identical in all material respects, as are the legal issues pertaining thereto.

Defendant Ford Credit urges that it cannot be held liable on any of plaintiff's claims because it is not a "creditor" as that term is defined in the federal act and Regulation Z, nor a "seller" as that term is defined in the state statute. Ford Credit also contends that plaintiffs have no cause of action under either federal or state law, because the credit agreements in question were rescinded some two months after execution. The Court cannot agree that Ford Credit is not a "creditor" within the meaning of the federal act and regulations, nor is it persuaded that there exists a genuine dispute as to this issue. The parties' answers to interrogatories and requests for admissions, as well as the other material on file in this action, show quite clearly that Ford Credit was a "creditor in this transaction as that term is defined in 12 C.F.R. §226.2(s). *Meyers v. Clearview Dodge Sales, Inc.* 539 F.2d 511, 514-15 (5th Cir. 1976). The Court is also of the opinion that Ford Credit may be held liable under the Texas act, regardless of whether it may be properly characterized as "seller." Plaintiffs allege that defendants violated Article 7.07(4) and (6) of the state statute, both of which impose certain duties on the "seller or holder." As holder of the credit agreements herein, Ford Credit may be held liable under those provisions and Article 8.01. *Horn v. Nationwide Financial Corp.*, 574 S.W.2d 218, 220 (Civ. App.—San Antonio 1978, writ ref'd, n.r.e.). Defendant Ford Credit also asserts that the execution of two documents styled "Voluntary Surrender" constituted recissions of the contracts in question, thereby precluding any recovery by plaintiffs. Although plaintiffs take issue with Ford Credit's characterization of those documents as recissions of the contracts, the Court need not decide that question, inasmuch as rescission does not bar recovery under the federal act, *Sellers v. Wollman*, 510 F.2d 119,

123 (5th Cir. 1975), and Ford Credit has not cited any authority which would require a different result under Texas state law. The Court is not persuaded by Ford Credit's argument that *Sellers* is inapposite because it involved the buyer's statutory right to rescission rather than voluntary rescission. Even if the "Voluntary Surrender" documents are sufficient to constitute rescissions of the credit agreements, which the Court declines to decide, the Court is nonetheless of the opinion that plaintiffs may sue for statutory damages. *See Phillbreck v. Timmers Chevrolet, Inc.*, 361 F.Supp. 1255, 1257 (N. D. Ga. 1973), *rev'd on other grounds*, 499 F.2d 971 (5th Cir. 1974).

Plaintiffs' claim that Ford Credit's failure to itemize individually the license, title and registration fees in the credit agreements constituted a violation of the federal act and Regulation Z is without merit. *Downey v. Whaley-Lamb Ford Sales, Inc.*, 607 F.2d 1093 (5th Cir. 1979); *Knighten v. Century Dodge, Inc.*, 607 F.2d 1096 (5th Cir. 1979). Likewise, plaintiffs' contention that the security interest retained by defendants is inadequately described is not well-taken. The credit agreements in question state that the "[s]eller shall have a security interest under the Uniform Commercial Code . . ." This description is sufficient to satisfy the requirements of 12 C.F.R. §226.8(b)(5), on which this claim of plaintiff is based. *Anthony v. Community Loan & Investment Corp.*, 559 F.2d 1363 (5th Cir. 1977). The particular rights of a secured party are not required to be disclosed. *Grant v. Imperial Motors*, 539 F.2d 506 (5th Cir. 1976).

Plaintiffs also claim that defendants violated the state statute in that the provisions of the credit agreements which are concerned with waiver of the buyers'

rights in personalty found in the vehicles upon repossession are in violation of Article 5069-7.07(4) and (6), which provide, in pertinent part, as follows:

"No retail installment contract or retail charge agreement shall:

* * * * * *

(4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the . . . repossession of a motor vehicle;

* * * * * *

(6) Provide that the buyer agrees not to assert against the seller or holder of [sic] any claim or defense arising out of the sale."

That portion of the credit agreements which plaintiffs contend violates the above statutory provisions is as follows:

> "Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

Ford Credit, relying on *Tradewinds Ford Sales, Inc. v. Caskey*,_____S.W.2d_____, (No. 5395, Tex. Civ. App.—Eastland April 24, 1980), argues that the above does no more than define the bailor-bailee relationship in the event that personal property not subject to the mortgage is found in the vehicle. The Court is not in agreement with those decision and is of the opinion that the language of this clause is not reasonably

susceptible of such an interpretation. *Cf. Martens v. General Motors Acceptance Corp.*, 584 S.W.2d 941, 943 (Tex. Civ. App.—Dallas 1979, no writ history). On the other hand, the Court is of the opinion that this clause does not violate Article 7.07(6) in that it does not affect the buyers' assertion of rights *arising out of the sales* of the vehicles. Consequently, plaintiffs are entitled to summary judgment as to their Article 7.07(4) claim, but not as to their 7.07(6) claim.

Plaintiffs also seek summary judgment as to claims raised in a supplemental memorandum in support of their motion for summary judgment, but not contained in their original complaint. The Court is of the opinion that these matters are not properly before it, and they will not be addressed.

Plaintiffs also seek summary judgment as to claims raised in a supplemental memorandum in support of their motion for summary judgment, but not contained in their original complaint. The Court is of the opinion that these matters are not properly before it, and they will not be addressed.

The parties also are in disagreement as to the proper measure of damages for the above violation on which the plaintiffs are entitled to summary judgment. First, plaintiffs urge that each of them is entitled to a separate statutory penalty for the violation in the credit agreement which they jointly signed. Although this would be true as to any violation of the federal act, *Davis v. United Companies Mortgage & Investment of Gretna*, 551 F.2d 971 (5th Cir. 1977), there is no conclusive authority on this issue under the texts statute. Nonetheless, the Court is of the opinion that each plaintiff is entitled to recover the statutory penalty under the

Texas statute. *See Berryhill v. Rich Plan of Pensacola*, 578 F.2d 1092, 1100 (5th Cir. 1978). Ford Credit urges that whatever recovery plaintiffs are entitled to must be reduced by one half because plaintiffs settled their claims against codefendant McMorris Ford. *See Palestine Contractors v. Perkins*, 386 S.W.2d 764 (Tex. 1965). The Court is of the opinion that Ford Credit's position is well taken, and the final judgment entered against it must be reduced accordingly. *See Desselles v. Mossy Motors, Inc.*, 442 F.Supp. 897, 903 (E.D.La. 1978). Consequently, the appropriate measure of damages in this case is as follows:

1) For plaintiff Gutierrez, for the violation of the Texas statute in the October 4 financing agreement $1,646.50

2) For both plaintiffs jointly, for the violation of the Texas statute in the October 18 financing agreement $6,193.04

TOTAL: $7,839.54

$7,839.54 divided by 2# $3,919.77, which is Ford Credit's total liability, plus attorneys' fees and costs of court. It is accordingly.

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for partial summary judgment be, and hereby is, GRANTED in part and DENIED in part, in accordance with this opinion;

it is FURTHER ORDERED that the judgment previously entered in this action pursuant to the Court's Memorandum Opinion and Order of April 3, 1980 be, and hereby is, VACATED;

it is FURTHER ORDERED that plaintiffs shall submit evidence as to the proper measure of attorneys' fees within ten (10) days of receipt of this Memorandum Opinion and Order by plaintiffs' counsel.

Entered the 20th day of May, 1980, at Austin, Texas.

/s/ _____

Jack Roberts
UNITED STATES SENIOR
DISTRICT JUDGE

Appellant's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 12 1981
ALEXANDER L. STEVAS,
CLERK

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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Ford Motor Credit Company
and Tradewinds Ford Sales, Inc.

QUESTIONS PRESENTED

1. Is the decision of the Texas Supreme Court here in conflict with the Due Process Requirements of the Federal Constitution, as those requirements are applied by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964)?
2. Can Article 5069-7.07(4) of the Texas Consumer Credit Code, which prohibits contractual waivers of rights of action for illegal acts committed in a repossession, be constitutionally extended by court construction to prohibit waivers of rights of action for conduct arising subsequent to a repossession?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-488

FORD MOTOR CREDIT COMPANY
AND
TRADEWINDS FORD SALES, INC.,
Appellants,

VS.

DON B. CASKEY, ET AL,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

REPLY TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.5 of the Rules of the Supreme Court of the United States, Appellants Ford Motor Credit Company and Yates Ford, Inc., file this Reply to Appellee's Motion to Dismiss or Affirm.

RESPONSE TO APPELLEE'S ARGUMENT

1. Response to Appellees' assertions regarding the issue of fair notice.

Appellees submitted three arguments to support their claim that Section 7.07(4) of the Texas Consumer Credit Code gives fair notice that it prohibits waivers of illegal acts *committed after* a repossession, notwithstanding the fact that the statute's clear terms relate only to waivers of acts *committed in* a repossession. First, Appellees claimed at pp. 4-5 that fair notice was

somehow given because the Texas Legislature intended to prohibit abusive conduct throughout the buyer-seller relationship. Appellees overlook the fact that the Legislature did not pass an all-encompassing statute which prohibited "abusive acts committed throughout the buyer-seller relationship." Indeed, such a statute would probably fail constitutional muster.[1] Instead, the Legislature prohibited certain specified contract provisions. One such specific prohibition, and the *only* one these Appellants are here charged with violating, involves waivers of acts *committed in* a repossession. It is against the backdrop of that precise statutory provision, not some vague concept of a "buyer-seller relationship," that this case must be viewed.

Appellees also overlook the well-settled rule that if statutory language is plain and unambiguous, there is no occasion for judicial construction and the statute must be given effect according to its plain meaning. *See*, 82 C.J.S., *Statutes*, § 322(2) at 577 (cases cited therein). Section 7.07(4) is plain and unambiguous, and there is no justification to resort to rules of construction, much less a hoary fiction like trespass ab initio, in order to construe it. Appellees have not violated the statute as written.

Second, Appellees asserted that the case *S.I.C.* v. *Mannix*, 557 S.W.2d 755 (Tex. 1977) was of some relevance. In fact, *Mannix* is readily distinguishable from *Zapata*, and actually demonstrates the constitutional infirmities present here. *Mannix* involved a contract clause which provided that:

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[1] Such a statute would be precisely that type of statute which the United States Supreme Court condemned in *Smith* v. *Goguen*, 415 U.S. 566 (1974):

> "[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." (at p. 573, fn. 9)

See, p. 28 of Appellants' Jurisdictional Statement.

> "Nothing shall prevent the Secured Party from removing [the property] from any premises to which same may be attached, upon default or breach of this Retail Installment Contract and Security Agreement or any part thereof, and the Debtor agrees to sustain the cost of repairs, if any, of any physical injury to the real estate caused by such removal."

The contract thereby freed the secured party from liability for damages caused by intentionally tortious conduct committed in the repossession itself, such as forceable entry to the buyer's home. Thus, the contract violated the literal terms of Section 7.07(4) (i.e. it waived a cause of action for an illegal act *committed in* a repossession), and there was no need in *Mannix* to extend the statute beyond its clear terms. Here, however, a violation of Section 7.07(4) may be upheld *only* by improperly extending the statute beyond its clear and unambiguous terms. *Mannix* neither explicitly nor implicitly justifies such a constitutionally improper interpretation.

Finally, Appellees argued that Appellants had "thumbed their nose" at *Ford Credit* v. *Cole*, 503 S.W.2d 853 (Tex.Civ.App. — Ft. Worth 1973, no writ). Appellees' argument concerning *Cole* is riddled with inaccuracies. First, the case was never appealed to the Texas Supreme Court, as suggested at p. 5 of Appellee's Motion. Second, *Cole* was a venue case which did *not* involve Section 7.07(4) or the Texas Credit Code in any way. Third, far from holding that the 24-hour clause waived liability or was illegal or was somehow against public policy, the Court instead stated that:

> "it would not be permissible to construe the language of the contracts to be exempted from liability in the event it should convert unsecured property of its mortgagor." (at p. 856)

In order to avoid such a construction of the contract, the *Cole* court properly read the personalty provision as permitting a suit for the "value of such property." *Id.* In other words, the 24-hour provision was construed in *Cole* as an election of remedy, which is not illegal, or against public policy and which is not prohibited by the Consumer Credit Code. Thus, not only did *Cole* not give

notice that the contract violated the Code, but it actually reenforced the view that the 24-hour provision did not waive any right of action.[2]

2. Response to Appellees' Discussion of Trespass Ab Initio.

Appellees ignored Appellants' extended discussion of trespass ab initio at pp. 13-17 of Appellants' Jurisdictional Statement. Instead, they asserted at pp. 6-7 that, prior to *Zapata*, the Texas Supreme Court had never repudiated the doctrine. That argument is disingenuous. The Texas Supreme Court never *adopted* the doctrine prior to *Zapata* v. *Ford Credit*, 613 S.W.2d 198 (Tex. 1981).[3] *See, Simpson* v. *Phillips Pipeline*, 603 S.W.2d 307, 309-10 (Tex. Civ. App. — Beaumont 1980, writ ref'd. n.r.e.). Indeed, the doctrine has been expressly repudiated in every case to reach the Supreme Court since 1924. *Id.*

Appellees also argued at p. 7 of their Motion that other Texas courts had found a Section 7.07(4) violation regarding the 24-hour provision without "resorting" to trespass ab initio. That argument was apparently supposed to bolster Appellees' assertion that the result in *Zapata* and *Caskey* may be affirmed even without reliance to trespass ab initio. *Those other courts, however, gave no rationale at all for extending Section 7.07(4) beyond its clear terms and applying it to post-repossession*

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[2] That interpretation of the 24-hour provision in *Cole* is consistent with the Texas rule that provisions are not to be interpreted as limitations of liability "if any other meaning may reasonably be ascribed to the language employed," *Langford* v. *Nevin*, 298 S.W. 536, 537 (Tex. 1927). The *Cole* opinion is also in accord with the rule governing penalty cases that if a contract is susceptible of more than one construction, it will, as a matter of law, be given the construction that makes it legal. *Walker* v. *Temple Trust Co.*, 80 S.W.2d 935, 936-37 (Tex. 1935); *Nevels* v. *Harris*, 102 S.W.2d 1046, 1049-50 (Tex. 1937). In the Courts below, Appellants have in fact relied upon *Cole* to show that the 24-hour provision was not a waiver of any right of action for any illegal act, whether committed in or after a repossession.

[3] The *Zapata* case has also been appealed to this court and is pending herein as No. 81-467.

events. They simply ignored the problem.[4] If anything, those cases only emphasize the lack of a fair basis for the statutory construction at issue.

3. Reply to Appellees' discussion of Bouie v. City of Columbia.

Appellees' analysis of *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), at pp. 8-9 of their Motion, contains little beyond the conclusionary statement that *Bouie* is inapplicable. Appellees' discussion of Section 7.07(4) at that part of their Motion does, however, highlight the constitutional infirmity involved in *Zapata* and *Caskey*. At page 8, Appellees first rewrote Section 7.07(4) so that it prohibits activity "in the repossession *process*." (emphasis added) Section 7.07(4) contains no such word as "process." Then, Appellees stated that the contract provision "clearly attempts to get the buyer to waive any claim he has for illegal acts committed by the seller of holder." *Id.* But, Section 7.07(4) does not prohibit waivers of claims for illegal acts, it prohibits waivers of claims for such acts *committed in the repossession*. By adding and deleting terms, Appellees implicitly concede that Section 7.07(4), by its own clear and unambiguous

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[4] Instead of addressing the statutory and constitutional problems posed by extending Section 7.07(4) beyond its terms, both the Corpus Christi Court of Civil Appeals and the federal district court referred to at p. 7 of Appellees' Motion created a strawman argument. Appellants had defended the personalty clause at issue by noting that it consisted of two parts. First, it allowed the Seller to take personalty in a repossessed car and to hold same without liability for the holding. That provision was defended as a mere restatement of the secured party's rights at common law and the law of bailment. The second part of the contract clause at issue was the 24-hour provision. That clause was defended on other grounds, including the constitutional problem at issue. No defense was asserted that the 24-hour provision was a mere restatement of bailment law. Yet, both courts referred to in Appellees' Motion characterized Appellant's defense of the 24-hour clause as strictly based on bailment. Thus, those courts ignored Appellants' real arguments regarding the 24-hour clause, and instead refuted one which had never been made!

terms, is insufficient to warrant the imposition of penalties on these Appellants.

4. Response to Appellees' argument about correction letters.

Finally, Appellees asserted that the correction procedure provided by the Texas Consumer Credit Code can limit Appellants' liability for the tens of thousands of contracts now placed at jeopardy by the *Zapata* and *Caskey* decision. That argument conceals more than it reveals. Even a massive and costly correction campaign would leave major questions to be litigated and relitigated in each of potentially thousands of separate suits — was the correction letter timely (i.e. was it sent within the time limits imposed by the Credit Code), was it adequate, was it received by the customer, etc. Thus under any circumstance, the *Zapata* and *Caskey* decisions will subject Appellants to a vast amount of litigation and to substantial costs. Those burdens spring wholly from the constitutionally infirm decisions at issue here, and are thus completely unjustified.

CONCLUSION

The decisions of the Texas Supreme Court in *Zapata* and *Caskey* should be reversed.

Respectfully submitted,

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RANDALL A. HOPKINS
Counsel of Record for Appellants

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Reply to Appellee's Motion to Dismiss or Affirm has been sent to all parties required to be served herein, including C. M. Henkel, 520 Guaranty Bank Plaza, Corpus Christi, Texas 78475 and the Attorney General of the State of Texas, Courts Building, Post Office Box 12548, Capitol Station, Austin, Texas 78711. Said copies were sent by certified mail, return receipt requested, on this .... day of November, 1981.

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RANDALL A. HOPKINS